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No. C-68-13.

In the United States District Court

FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION.

RICHARD NEMITZ, MARTIN RILEY, L. J. WUERTZ and JOSEPH FITZ, Suing on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

vs.

NORFOLK AND WESTERN RAILWAY CO.,

Defendants.

DOCKET ENTRIES.

1-22-68. Complaint filed.

1-22-68. Summons issued. Copy of complaint and copy of summons to U.S. Marshal.

2-16-68. Stipulation and order extending time to 2-28-68 for defendant to move, or plead filed. DJY. Copies 77(d) mailed to Murray and Maguire.

2-21-68. Summons returned, served 2-5-68 and filed.

3-1-68. Stipulation and order extending time to 3-11-68 for defendant to move or plead filed. DJY. Copies 77 (d) mailed to Murray and Maguire.

3-11-68. Defendant's motion to dismiss filed. Mailed 3-11-68.

3-11-68. Affidavit with attached exhibits in support of defendant's motion to dismiss filed. Mailed 3-11-68.

3-25-68. Stipulation by parties amending complaint filed.

3-25-68. Motion by plaintiff for summary judgment filed. Mailed 3-25-68.

3-27-68. Statement of reasons in opposition to plaintiffs' motion for summary judgment by defendant filed. Mailed 3-27-68.

3-29-68. Plaintiff's reply brief to defendant's statement of reasons filed. Mailed 3-29-68.

4-8-68. Motion by defendant for leave to file response to plaintiffs' reply brief filed. Mailed 4-8-68.

4-10-68. Order granting defendant leave to file response to plaintiffs' reply brief instanter filed. DJY. Copies 77(d) mailed to Murray and Maguire.

4-10-68. Response of defendant to plaintiffs' reply brief filed. Mailed 4-8-68.

4-17-68. Motion by plaintiffs for leave to file response to defendant's reply brief filed. Mailed 4-16-68.

4-18-68. Motion by defendant for leave to file answer to plaintiffs' reply brief filed. Mailed 4-18-68.

4-25-68. Plaintiff's motion for leave to file response to defendants reply brief filed. Mailed 4-24-68.

7-25-68. Memorandum re defendant's motion to dismiss filed. DJY. Copies mailed to: Murray and Maguire.

7-25-68. Order sustaining parties motions for leave to file additional briefs filed. DJY. Copies 77(d) mailed to: Murray and Maguire.

7-25-68. Order overruling defendant's motion to dismiss, overruling defendant's motion for summary judgment, overruling plaintiffs' motion for summary judgment filed. DJY. Copies 77(d) mailed to Murray and Maguire.

7-25-68. Reply Brief of plaintiff filed. Mailed 4-16-68.

7-25-68. Answer to plaintiffs' reply brief filed. Mailed 4-18-68.

7-25-68. Answer to defendants reply brief filed. Mailed 4-24-68.

9-4-68. Answer filed. Mailed 9-4-68.

9-4-68. Third party complaint filed.

9-4-68. Third-party summons issued. Copy of summons and copy of complaint to U.S. Marshal.

9-18-68. Letter re agreement between parties as to an extension of time for defendant (third party) to 10-15-68 to move or plead filed.

10-25-68. Stipulation and order extending time to 11-13-68 for third party defendant to file a responsive pleading filed. DJY. Copies 77(d) mailed to Murray, Maguire and Hart.

11-13-68. Answer of third party defendant filed. Mailed 11-12-68.

12-3-68. Third-party summons returned, served 10-31-68 and filed. $3.00

4-16-69. Notice to attend pre-trial conference on 5-12-69 mailed.

5-1-69. Trial brief of third-party defendant filed.

5-1-69. Trial brief of defendant filed.

5-8-69. Trial brief of plaintiff filed.

5-12-69. Pre-trial order filed. DJY. Cause is set for trial on 9-15-69. Copies 77(d) mailed to Murray, Maguire and Hart.

8-5-69. Deposition of Frank A. Johnson on behalf of plaintiffs, filed.

8-7-69. Plaintiff's motion for summary judgment, with attached memorandum in support of, filed. Copy mailed.

8-7-69. Deposition of Fred S. Yancey on behalf of plaintiffs, filed.

8-19-69. Plaintiff's interrogatories, filed. Copies mailed 8-15-69.

8-19-69. Defendant's answers to plaintiff's interrogatories, filed. Copy mailed.

8-21-69. Stipulation and Order between parties, agreeing as to authenticity of copies of agreements marked Joint Exhibits 1-10, inclusive, filed. DJY. Notice waived.

8-21-69. Stipulation and Order granting defendant until September 2, 1969 in which to file its statement of reasons in opposition to plaintiff's motion for summary judgment, filed. DJY. Notice waived.

8-27-69. Deposition of W. A. Noell on behalf of defendant, filed.

9-2-69. Defendants memorandum in opposition to plaintiffs motion for Summary judgment, filed. Copy mailed.

9-2-69. Defendants motion for summary judgment with statement of facts in support of, filed. Copy mailed.

9-3-69. Defendants exhibit list, with accompanying exhibits, filed. Copy mailed (exception of "B" as too bulky) 9-3-69.

9-11-69. Plaintiff's reply memorandum to defendants brief in opposition to plaintiff's motion for summary judgment, filed. Copy mailed 9-10.

9-15-69. Deposition of Joseph E. Fitz a plaintiff for defendant Norfolk & Western RR., filed.

9-15-69. Plaintiff's exhibit list, filed. Copy mailed 9-11-69.

9-17-69. Plaintiffs Memorandum in opposition to defendants motion for summary judgment, filed.

9-17-69. Defendant's Reply to plaintiffs' memorandum in opposition to defendants motion for summary judgment, filed, Copy mailed 9-17-69.

9-19-69. Plaintiffs reply memorandum to defendants memorandum, filed.

10-14-69. Photocopy of Brief of the Interstate Commerce Commission, Amicus Curiae filed.

10-21-69. Plaintiff's brief in reply to N & W, filed.

12-19-69. Opinion of the Court, filed. Copies 77(d) to Murray, Maguire & Hart. DJY,J.

12-31-69. Plaintiffs Order (Rule 4(a)), Lodged.

1-6-70. Defendants statement of objections as to plt's. proposed form of judgment, filed. Copy mailed.

1-6-70. Defendants Final Judgment as to Plaintiffs and defendant, Lodged.

1-8-70. Ordered that a declaratory judgment be rendered in favor of plaintiffs against defendant, requiring that parties submit to arbitration the question of the amount of damages, as required by protective order of ICC, and Ordered that if parties desire to proceed with defendants third-party complaint, they shall so advise the Court before Jan. 15, 1970, but any such proceedings will be deferred until completion of arbitration, and this judgment shall constitute an appealable order as to plaintiffs & defendant, filed. DJY,J. Copies 77(d) to all counsel.

1-12-70. Motion for awarding of Attorneys fees, memorandum in support affidavit in support, memorandum in support of motion for Attorneys fees and certification, filed.

1-16-70. Defendants statement of objection to pltf's. motion for attorney fees, filed. Copy mailed.

2-5-70. Notice of appeal, filed. Copies to Murray & Hart.

2-5-70. Bond in the amount of $250.00 for costs with Aetna Casualty & Surety Co., filed.

3-16-70. Order extending time to March 30, 1970 for filing record and docketing the appeal filed. DJY. Copies 77d to Ct. of Appeals, Murray; Maguire.

3-23-70. Order denying plaintiffs' application for assessment of attorney's fees with leave to renew the application after damages have been determined filed. DJY. Copies 77(d) mailed to: Murray, Maguire and Hart on 3-26-70.

3-24-70. Letter and list of exhibits to be included with the record on appeal filed.

3-26-70. Certified record on appeal mailed to the Sixth Circuit Court of Appeals.

4-1-70. Acknowledged receipt from U.S. Court of Appeals, filed 3-30-70, filed. Their #20326.

COMPLAINT.

(Filed January 22, 1968.)

1. This action arises under U.S.C., Title 28, Sections 1336 and 1337; U.S.C., Title 49, Sections 5, 9, and 16, paragraph (12) as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand and no/100 dollars ($10,000.00).

2. Plaintiffs, Richard Nemitz, Martin Riley, L. J. Wuertz and Joseph Fitz, bring this action on behalf of themselves and all other members similarly situated of Cedar Point Lodge No. 844 of the Brotherhood of Railroad Trainmen. The said similarly situated members of Cedar Point Lodge No. 844 number approximately twenty-five (25) and it is, therefore, impracticable to bring them all before the Court; and there are questions of law or fact presented herein which are common to the entire number of similarly situated members of Cedar Point Lodge

No. 844 of the Brotherhood of Railroad Trainmen; the claims of the plaintiffs are typical of the claims of the said class; and the plaintiffs are fairly and adequately protecting the interests of said class.

3. The defendant, Norfolk and Western Railway Co., is a corporation duly organized under the laws of the State of Virginia with its principal place of business in Roanoke, Virginia. During all times herein mentioned, defendant owned and operated in Interstate Commerce a railroad company in and through various states, including Ohio. All the acts of the corporation hereinafter alleged were done by said corporation's agents, acting within the course of their employment and within the scope of their respective duties.

4. By application filed in Interstate Commerce Commission Docket No. 21512 on March 17, 1961, the defendant railway sought authority under U.S.C., Title 49, Section 5(2) to purchase from the Connecting Railway Co. its Sandusky Line of railroad between Hudson Street in Columbus, Ohio, and its terminus of the line in Sandusky, Ohio, together with certain additional trackage in Columbus, Ohio.

5. During all times herein mentioned the Connecting Railway Co. was a Pennsylvania Corporation, with railroad properties in the states of Ohio, Michigan, and Pennsylvania, and at all times herein all of its railroad property was leased to and operated by the Pennsylvania Railroad Co. as part of its system.

6. Included in the Connecting Railway Company's leased property until on or about October 16, 1964, was the aforesaid Sandusky Line, which the Connecting Railway Co. leased to the Pennsylvania Railroad Co., and which made up part of the Pennsylvania Railroad Co.'s Toledo Division.

7. The aforesaid Sandusky Line of railroad at all times herein has been used primarily to move coal from Columbus, Ohio, and points south thereof, to three coal

docks located at Sandusky, Ohio, for transshipment by lake vessel.

8. The principal purpose of the Norfolk and Western Railway Co.'s application with the Interstate Commerce Commission for purchase of the aforesaid Sandusky Line was to enable the Norfolk and Western Railway Co. to extend its line to the shores of Lake Erie, thereby obviating the necessity of sharing revenues with the Pennsylvania Railroad Co. for moving coal from points south of Columbus, Ohio, and elsewhere to the shores of Lake Erie for transshipment by vessel.

9. At all times herein, until on or about October 16, 1964, these plaintiffs were employed by the Pennsylvania Railroad Co. as brakemen in the Toledo Division of that Company, making their homes in Sandusky, Ohio.

10. Until on or about October 16, 1964, these plaintiffs enjoyed all rights in the entire Toledo Division of the Pennsylvania Railroad Co., as to wages, seniority, and conditions of employment under existing agreements between the Pennsylvania Railroad Co. and the Brotherhood of Railroad Trainmen.

11. Prior to October 16, 1964, these plaintiffs, as brakemen for the Pennsylvania Railroad Co., worked on the Sandusky Line at all times during which, in the exercise of their seniority, they were able to hold jobs on the said Sandusky Line in accordance with the seasonal volume of business on that line. When the lakes were frozen or when the business volume was such that they were unable, in the exercise of their seniority, to hold a job on the Sandusky Line, these plaintiffs worked out of other parts of the Pennsylvania Railroad Co.'s Toledo Division; namely, the Toledo, Ohio yards; the Lincoln Park, Michigan yards; or the yards at Tiffin, Ohio. Thereby these plaintiffs were able to work a substantial part of the year near their homes in Sandusky, Ohio; and during times when business was slack due to seasonal factors at Sandusky, Ohio, they were able to commute to work at other parts of the Toledo Division until such time as they were

able, in the exercise of their seniority, to hold a job at Sandusky. In this way, plaintiffs were able for the most part, to work throughout twelve (12) months of the year.

12. On June 24, 1964, the Interstate Commerce Commission approved the defendant railway's aforesaid application for authority to purchase from the Connecting Railway Co. (and its lessee, Pennsylvania Railroad Co.) the aforesaid Sandusky Line. This order, pursuant to recommendations contained in the report of the hearing examiner, and in compliance with U.S.C., Title 49, Section 5(2), imposed certain conditions for the protection of these plaintiffs and all railway labor of the Pennsylvania Railroad Co., who would be adversely affected with respect to their compensation, rules, working conditions, fringe benefits, or privileges pertaining thereto by this transaction.

13. These conditions imposed by the Interstate Commerce Commission so far as pertinent to this cause, were made up of protective provisions contained in agreements entered into on January 10, 1962, between representatives of the defendant railway and the Brotherhood of Railroad Trainmen. The Interstate Commerce Commission incorporated these protective provisions by reference in its order approving the aforesaid application by the defendant railway for purchase of the said Sandusky Line. (A copy of these agreements are attached hereto and marked Plaintiffs' "Exhibit A.")

14. In and by these conditions, defendant railway was required to take into its employment all employees represented by labor organizations signatory to the agreements of January 10, 1962, between the defendant railway and the labor organizations signatory thereto, who between the effective date of that agreement and the date said acquisition was consummated, exercised employment rights on the Sandusky Line, and who elected to accept employment with the defendant railway. (See Plaintiffs' "Exhibit A," page 8.)

15. Said conditions imposed by the Interstate Commerce Commission's order of June 24, 1964, further required that when it was determined that an employee, subject to these terms and conditions, had been adversely affected as to his compensation because of the transaction involved, the adversely affected employee was to receive a "displacement allowance" determined in substance as follows: an affected employee's "displacement allowance" was to be determined by taking the total compensation received by the affected employee for the last twelve (12) months in which he performed service for the Pennsylvania Railroad Co., beginning with the month immediately preceding the month in which it was determined he was adversely affected, such twelve (12) months being referred to as the "test period," and then dividing by twelve (12). If said affected employee's compensation was less in any month because of the transaction involved than the aforesaid "average monthly compensation," he was to be paid the difference, less compensation for any time lost on account of absence to the extent he was not available for service under applicable schedule rules. (See Plaintiffs' "Exhibit A," pages 18 and 19.)

16. Pursuant to the Interstate Commerce Commission's order of June 24, 1964, approving defendant railway's application for the purchase of the Sandusky Line, defendant railway on or about October 1, 1964, in conjunction with the Pennsylvania Railroad Co., notified, in writing, all affected employees of the Toledo Division of the Pennsylvania Railroad Co., that on or after October 16, 1964, defendant railway would assume ownership and operation of that part of the Toledo Division of the Pennsylvania Railroad Co. known as the Sandusky Line; and that accordingly, the employees of the Toledo Division of the Pennsylvania Railroad Co., who had exercised employment rights on the Sandusky Line as hereinabove set forth, were to elect to accept employment on what was to become, on or about October 16, 1964, the Sandusky Line of the Norfolk and Western Railway Co.'s Scioto Di-

vision; or in the alternative, said employees were to remain with the Pennsylvania Railroad Co., thereby retaining all their existing rights in the remaining parts of the Toledo Division of the Pennsylvania Railroad Co.

17. On or before October 16, 1964, these plaintiffs, concurrently notified the defendant railway and the Pennsylvania Railroad Co., in writing, of their decision to take employment with the defendant railway on or after October 16, 1964.

18. On or about October 16, 1964, defendant railway assumed ownership and operation of the said Sandusky Line, which became part of the defendant railway's Scioto Division.

19. As a direct and proximate result of the acquisition of the said Sandusky Line by the defendant railway, these plaintiffs, for many months after October 16, 1964, were adversely affected as to their compensation.

20. These plaintiffs were adversely affected as to their compensation by said transaction either because they were unable, in the exercise of their seniority rights, to hold a job at Sandusky in defendant railway's Scioto Division, or because what jobs they were able to hold at Sandusky yielded less compensation than they had earned during the "test period" provided in the Interstate Commerce Commission's order of June 24, 1964. (See Plaintiffs' "Exhibit A," pages 18 and 19.)

21. As a result of the foregoing, these plaintiffs, pursuant to U.S.C., Title 49, Section 5(2), became entitled to displacement allowances in accordance with the Interstate Commerce Commission's order of June 24, 1964.

22. Defendant railway, as herein more fully appears, has failed to comply with the conditions imposed by the Interstate Commerce Commission's order of June 24, 1964, for the protection of these plaintiffs and others on whose behalf this claim is asserted, who were adversely affected by the aforesaid acquisition by the defendant railway of the said Sandusky Line.

23. Plaintiff, Richard Nemitz's total compensation during the twelve (12) month "test period" provided for in the Interstate Commerce Commission's order of June 24, 1964, was seven thousand and no/100 dollars ($7,000.00). Said plaintiff was, therefore, entitled to an "average monthly compensation" of five hundred eighty-three and 33/100 dollars ($583.33) for each month in which he was adversely affected by the aforesaid transaction. Therefore, said plaintiff was entitled to the difference between five hundred eighty-three and 33/100 dollars ($583.33) and his earnings after October 16, 1964, for each month in which his compensation, in the exercise of his seniority, was less because of the transaction involved than the aforesaid five hundred eighty-three and 33/100 dollars ($583.33) "average monthly compensation."

24. For approximately twenty-four (24) months after October 16, 1964, plaintiff, Richard Nemitz, in the exercise of his seniority, was able to earn a total sum of approximately three thousand three hundred three and 13/100 dollars ($3,303.13) in the Sandusky yards. He thereby became entitled to displacement allowances for that twenty-four (24) month period in the approximate sum of ten thousand six hundred ninety-six and 87/100 dollars ($10,696.87); namely, the difference between his total compensation of three thousand three hundred three and 13/100 dollars ($3,303.13) for the twenty-four (24) month period and the fourteen thousand and no/100 dollars ($14,000.00) displacement allowances provided for in the Interstate Commerce Commission's order of June 24, 1964.

25. Since October 16, 1964, defendant railway has paid plaintiff, Richard Nemitz, the approximate sum of one thousand six hundred eighty-nine and 61/100 dollars ($1,689.61) as displacement allowances; said sum is approximately nine thousand seven and 26/100 dollars ($9,007.26) less than this plaintiff was entitled to in accordance with conditions imposed by the Interstate Commerce Commission's order of June 24, 1964.

26. Plaintiff, L. J. Wuertz, during approximately twenty-four (24) months after October 16, 1964, became entitled to a total displacement allowance of approximately ten thousand and no/100 dollars ($10,000.00); defendant railway has paid said plaintiff approximately one thousand seventy-two and 20/100 dollars ($1,072.20) as displacement allowances since October 16, 1964; said sum is approximately eight thousand nine hundred twenty-seven and 80/100 dollars ($8,927.80) less than this plaintiff was entitled to under the conditions imposed by the Interstate Commerce Commission's order of June 24, 1964.

27. Plaintiff, Martin Riley, during approximately twenty-four (24) months after October 16, 1964, became entitled to total displacement allowances of approximately twelve thousand and no/100 dollars ($12,000.00); defendant railway has paid said plaintiff approximately three thousand four hundred fifty-two and 84/100 dollars ($3,452.84) as displacement allowances since October 16, 1964. Said sum is approximately eight thousand five hundred forty-seven and 16/100 dollars ($8,547.16) less than this plaintiff was entitled to under the conditions imposed by the Interstate Commerce Commission's order of June 24, 1964.

28. Plaintiff, Joseph E. Fitz, during approximately twenty-four (24) months after October 16, 1964, became entitled to total displacement allowances in the approximate amount of six thousand and no/100 dollars ($6,000.00); defendant railway has paid said plaintiff approximately one thousand five hundred fifty-eight and 90/100 dollars ($1,558.90) as displacement allowances since October 16, 1964. Said sum is approximately four thousand four hundred forty-one and 10/100 dollars ($4,441.10) less than this plaintiff is entitled to under conditions imposed by the Interstate Commerce Commission's order of June 24, 1964.

29. Plaintiffs further say that the defendant railway has failed to pay to all other plaintiffs on whose behalf this claim is asserted the full amounts to which they were entitled as displacement allowances under the conditions

imposed by the Interstate Commerce Commission's aforesaid order of June 24, 1964.

30. Plaintiffs say that they were entitled under the Interstate Commerce Commission's order of June 24, 1964, as displacement allowances, an "average monthly compensation" determined by their earnings throughout the entire Toledo Division of the Pennsylvania Railroad Co. during the aforesaid "test period," divided by twelve (12); that by paying these plaintiffs an "average monthly compensation" based upon only their total Sandusky Line earnings during the said "test period" divided by twelve (12), defendant railway, in violation of U.S.C., Title 49, Section 5(2), placed these plaintiffs in a substantially worse position with respect to their employment than they were in prior to the acquisition by defendant railway of the said Sandusky Line.

31. Plaintiffs further say that at all times herein, until approximately March, 1967, they attempted, through the local chairman of Lodge No. 844 of the Brotherhood of Railroad Trainmen, to get defendant railway to pay them in full the displacement allowances to which they became entitled after October 16, 1964, under the terms of the Interstate Commerce Commission's order of June 24, 1964, as herein set forth; that after considerable delay and discussion occasioned substantially by difficulties in procuring the necessary records concerning these plaintiffs' claims, defendant railway in violation of federal law as aforesaid, paid these plaintiffs displacement allowances based only upon those services performed by plaintiffs on the Sandusky Line during the aforesaid "test period" provided in the aforesaid Interstate Commerce Commission's order of June 24, 1964.

WHEREFORE, Plaintiffs demand judgment:

1. That this Court decree these plaintiffs are entitled to displacement allowances from and after October 16, 1964, determined by their total earnings throughout the entire Toledo Division of the Pennsylvania Railroad Co. during the "test period" provided in the Interstate Commerce Commission's order of June 24, 1964.

2. That they be awarded damages as provided in U.S.C., Title 49, Section 9, for the difference between the amounts actually paid as displacement allowances by defendant railway to these plaintiffs and the full amounts to which they are entitled under U.S.C., Title 49, Section 5, and as provided in the Interstate Commerce Commission's order of June 24, 1964.

3. That a special master be appointed at defendant's cost for the purpose of determining all amounts due these plaintiffs and others on whose behalf this claim is asserted, under the terms of the Interstate Commerce Commission's order of June 24, 1964.

4. That the Norfolk and Western Railway Company, its officers, agents, employees, attorneys, and all others acting in concert or participation with them in accordance with provisions set forth in U.S.C., Title 49, Section 16(12) be permanently restrained and enjoined from failing to comply with the Interstate Commerce Commission's order of June 24, 1964.

5. That plaintiffs recover their costs.

THOMAS MURRAY,
Attorney for Plaintiffs.

DEFENDANT'S MOTION TO DISMISS.

(Filed March 11, 1968.)

Defendant respectfully moves the Court for an order to dismiss the Complaint herein for the following reasons:

1. The Court lacks jurisdiction of the subject matter for the reason that exclusive, primary jurisdiction is vested in the National Railroad Adjustment Board under § 3 First of the Railway Labor Act (45 U.S.C.A. § 153 First).

2. The claims set forth in the Complaint herein have been settled by defendant and the bargaining representative of plaintiffs, and plaintiffs' cause of action is therefore barred as a matter of law by reason of an accord and satisfaction.

3. There has been no exhaustion or attempted exhaustion of administrative remedies available to plaintiffs under the applicable agreements between defendant and the Brotherhood of Railroad Trainmen and under § 3 First of the Railway Labor Act.

/s/ JOHN M. CURPHEY,
/s/ ROBISON, CURPHEY & O'CONNELL,
Attorneys for Defendant.

MOTION FOR SUMMARY JUDGMENT BY PLAINTIFFS.

(Filed March 25, 1968.)

Plaintiffs move the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a Summary Judgment in Plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to a judgment as a matter of law; or, in the alternative,

2. If Summary Judgment is not rendered in plaintiffs' favor upon the whole case or for all the relief asked and a trial is necessary, that the Court, at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

This motion is based upon:

(a) Complaint and Exhibits attached thereto.

(b) Defendant's Motion to Dismiss, admissions contained therein, and Exhibits attached thereto.

(c) Plaintiffs' Motion for Summary Judgment and Exhibits attached thereto.

(d) Affidavits filed herein.

/s/ THOMAS J. MURRAY,
MURRAY & MURRAY,
Attorneys for Plaintiffs.

AMENDMENT OF COMPLAINT BY STIPULATION.

(Filed March 25, 1968.)

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein that the complaint be and the same is hereby amended in the following particulars:

1. Amending Paragraph 1, first sentence to read as follows: "This action arises under U.S.C., Title 28, Sections 1336 and 1337; U.S.C.A., Title 49, Sections 5(2) (f), 8, 9, and 16 (12) as hereinafter more fully appears."

2. By adding to said complaint a paragraph numbered 32 as follows: "Plaintiffs further say that said allowances paid as set forth in paragraph 31 herein were paid to them over protest on their behalf by their local chairman, Joseph Fitz; that they accepted said payments with the understanding that said acceptance in no way prejudiced their rights to seek the full protective benefits due them under 49 U.S.C.A., Section 5 (2) (f); and that through their local chairman, they have at all times herein, taken all steps reasonably available to them in order to receive the payment of aforesaid benefits in full without resort to litigation."

3. Amending demand paragraph No. 1 to read as follows: "That this Court decree these Plaintiffs are entitled to protective benefits in accordance with 49 U.S.C.A., Section 5 (2) (f), for each and every month since the date of the aforesaid acquisition in which they earned a monthly compensation less than the 'average monthly compensation' provided for under the Interstate Commerce Commission's Order of 24 June, 1964."

4. Amending demand paragraph No. 2 to read as follows: "That they be awarded damages as provided in 49 U.S.C.A., Section 9, for the difference between the amounts actually paid them to date as

protective benefits by Defendant Railway, and the full amounts to which they are entitled under 49 U.S.C.A., Section 5 (2) (f), as provided by the Interstate Commerce Commission's Order of 24 June, 1964."

5. Striking out paragraph No. 3 of the demand and inserting in lieu thereof the following: "That this Court compel production of the books and records of Defendant Railway necessary for a prompt determination of the total protective benefits due these Plaintiffs in accordance with 49 U.S.C.A., Section 5 (2) (f) and as provided by the Interstate Commerce Commission's Order of 24 June, 1964."

6. Striking out paragraph 5 of the demand and inserting in lieu thereof the following: "That Plaintiffs recover, in addition to the full amount of damages to which they may be entitled, their costs in full, including a reasonable attorney's fee to be fixed by the Court as part of the costs of this case, in accordance with 49 U.S.C.A., Section 8."

Dated: March 25, 1968.

/s/ THOMAS J. MURRAY
Attorney for Plaintiffs.

/s/ JOHN M. CURPHEY
Attorney for Defendant.

MEMORANDUM RE DEFENDANT'S MOTION TO DISMISS.

(Filed July 25, 1968.)

YOUNG, *J.*:

This is an action brought by plaintiffs, on behalf of themselves and all other members similarly situated of Cedar Point Lodge No. 844 of the Brotherhood of Railroad Trainmen, to recover damages incurred from the defendant railway's alleged violation of conditions imposed upon the parties by the Interstate Commerce Commission on June 24, 1964, and to enjoin further violations of the Commission's order. The cause of action is said by plaintiffs to arise under 28 U.S.C. § 1336 and § 1337, and 49 U.S.C. §§ 5(a)(f), 8, 9, and 16(12).

Defendant railway has filed a motion to dismiss on the grounds that the Court lacks jurisdiction of the subject matter, there has been no exhaustion of administrative remedies by the plaintiffs, and the claims set forth have already been settled by the parties. Defendant accompanied the motion with an affidavit and attached exhibits. On the basis of the complaint and attached exhibits, and on the basis of defendant's motion to dismiss accompanied by supporting material, plaintiffs then filed a motion for summary judgment in their favor, attaching to their motion an affidavit and exhibits. In addition to these pleadings and motions, there have also been numerous reply briefs filed by both parties, urging that their own motions be granted, and attacking the merits of the other party's position in the matter. Since the defendant's motion to dismiss has been accompanied with affidavits and exhibits, and the Court has considered those filings in addition to the bare motion, defendant's motion will be treated as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, and the plaintiffs' motion as a cross motion for summary judgment.

Before the Court rules on the merits of the cross motions for summary judgment, a brief outline of the facts and history of this case is in order. Plaintiffs are four of

approximately twenty-five similarly situated members of Cedar Point Lodge No. 844 of the Brotherhood of Railroad Trainmen, suing on behalf of the entire class of about twenty-five members who have similar claims against the defendant. Prior to October 16, 1964, these plaintiffs were employed by the Pennsylvania Railroad Co. as Brakemen in the Toledo Division of the Company. Before that date, the Connecting Railway Co. was a Pennsylvania Corporation which leased its railroad properties to the Pennsylvania Railroad, and part of its trackage was known as the Sandusky Line, running from Columbus, Ohio and terminating in Sandusky, Ohio. Up until this date in 1964, plaintiffs as brakemen for the Pennsylvania Railroad Co. worked on the Sandusky Line whenever jobs were available for them there, primarily during those months of the year when Lake Erie was not frozen and shipping was possible. During the rest of the year, plaintiffs worked out of other railroad yards owned by the Pennsylvania Railroad Co. and located in the Toledo Division, so that they were able to work throughout most of the twelve months of the year. Since a substantial part of their work was on the Sandusky Line leased by the Pennsylvania Railroad, these plaintiffs all made their homes in the Sandusky, Ohio area. On March 17, 1961, the defendant railway sought authority from the Interstate Commerce Commission by an application bearing Docket No. 21512 to purchase from the Connecting Railway Co. its Sandusky Line and other trackage in Columbus, Ohio. This application was made under the provisions of 49 U.S.C. § 5(2). On June 24, 1964, the I.C.C. approved the defendant's application for authority to purchase the Sandusky Line from the Connecting Railway Co., and the order granting such authority imposed certain conditions for the protection of employees who might be adversely affected by the purchase, pursuant to the mandate in 49 U.S.C. § 5(2)(f) to attach such conditions to an order before it is approved. These conditions concerned the compensation, rules, working conditions, and fringe benefits of employees affected by the purchase, and were made up from the Washington Job

Protection Agreement of 1936, and an agreement of January 10, 1962, between the defendant railroad company and the Brotherhood of Railroad Trainmen. Pursuant to the terms of these agreements incorporated in the I.C.C. order, plaintiffs elected to take employment with the defendant railway after October 16, 1964, the date set for the transfer of ownership and control of the Sandusky Line to the defendant railway. Since the date of that transfer, plaintiffs have been able to earn only a fractional amount of what they had been earning monthly before the acquisition by working on the Sandusky Line and the other nearby lines of the Pennsylvania Railroad. Plaintiffs contend that the conditions imposed under the I.C.C. order of June 24, 1964, entitle them to a guaranteed wage equal to their average monthly compensation during the year prior to the acquisition, and that their average monthly compensation during that so-called "test period" is to be based upon their earnings throughout the entire Toledo Division of the Pennsylvania Railroad Co. during that year, divided by twelve. Therefore, the plaintiffs contend, any deficit between that average amount earned before the purchase and what they are able to earn now and since the date of purchase, must be reimbursed them under the conditions embodied in the I.C.C. order of approval. The defendant railway has taken the position that the average monthly earnings under the terms of the I.C.C. order are to be determined by taking the plaintiff's earnings during the test year which resulted from work on the Sandusky Line only, and dividing that figure by twelve months to arrive at an average monthly sum. In order to settle this dispute, plaintiffs attempted through the local chairman of Lodge No. 844 of the Brotherhood to receive the compensation which they claim they have coming under the terms of the I.C.C. order. The defendant railway, however, only paid the plaintiffs displacement allowances based upon a monthly average of earnings from work on the Sandusky Line during the test year, and at that point the plaintiffs brought the controversy to this Court.

In their motion for summary judgment, plaintiffs con-

tend that the pleadings, affidavits, and admissions on file show that there is no genuine issue as to any material fact, and that since the defendant has placed them "in a worse position with respect to their compensation" in violation of 49 U.S.C. § 5(2)(f) by not complying with the I.C.C. protective conditions, they are entitled to recover their damages as a matter of law. Plaintiffs request that a special master be appointed to determine the amounts due and owing to them from defendant's non-compliance with the I.C.C. order, that the Court compel production of the books and records of defendant railway in order that such a determination may be promptly made, that the defendant railway and its agents be permanently enjoined from failing to comply with the I.C.C. order, and that plaintiffs recover in addition to damages their costs and reasonable attorney's fees under 49 U.S.C. § 8.

In its motion to dismiss, defendant first contends that this Court lacks jurisdiction of the subject matter, in that primary jurisdiction is vested in the National Railroad Adjustment Board under 45 U.S.C. § 153. Where the dispute involves the interpretation and application of collective bargaining agreements and other labor agreements, defendant states that the National Railroad Adjustment Board not only has primary jurisdiction, but mandatory and exclusive jurisdiction as well, and cites numerous holdings of the United States Supreme Court to that effect. Plaintiffs do not dispute that these cases are the law and set forth the general rule of exclusive jurisdiction of railroad labor disputes in the Adjustment Board, but instead contend that this suit falls within a statutory exception to that rule. Plaintiffs contend that they are not seeking to invoke this Court's jurisdiction to hear a dispute arising out of an ordinary labor agreement between a railroad and the Brotherhood, but rather are suing to recover damages on the ground that the defendant railroad has violated certain conditions imposed by the Interstate Commerce Commission upon the parties, and are also seeking to enjoin further violations of these conditions. When defendant railroad purchased the Sandusky Line which the

plaintiffs had been working on for the Pennsylvania Railroad, it was participating in a transaction authorized by 49 U.S.C. § 5(2) and § 5(2)(f) of that chapter provides:

> "(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interest of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

Plaintiffs contend that the above language not only *authorizes* the I.C.C. to attach conditions to their orders under this chapter, but that Congress has given the Commission a *mandate* to do so. The June 24, 1964, I.C.C. order approving the Norfolk and Western's purchase of the Sandusky Line incorporated by reference at pages 72 and 73 conditions designed to protect the interests of the employees affected, thus complying with the requirements of the statute. These conditions were based upon agreements of understanding made between the defendant and the Brotherhood of Railroad Trainmen on January 10, 1962, and also provisions of the Washington Job Protection Agreement of 1936, in order that any situations not covered by the former provisions would be taken care of by

the latter. Plaintiffs claim that they have been adversely affected with respect to their employment as a direct result of the defendant's purchase of the Sandusky Line, and that therefore they are entitled to damages under 49 U.S.C. § 9, and an injunction under the provisions of 49 U.S.C. § 16(12). Section 9 provides:

> "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Section 16(12) of Title 49 provides:

> "If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order.

> If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

Plaintiffs contend that these two statutory provisions, reinforced by 28 U.S.C. §§ 1336 and 1337, establish jurisdiction in the district courts for a cause of action seeking damages and an injunction. Plaintiffs argue that any claim by the defendant that the Interstate Commerce Act is not paramount over the Railway Labor Act is dispelled by both 49 U.S.C. § 5(11) and the case law. Section 5(11) provides in pertinent part as follows:

> "The authority conferred by this section shall be exclusive and plenary, * * * and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. * * *"

With regard to the defendant's jurisdictional argument, plaintiff places primary reliance upon the case of *Brotherhood of Loc. Eng'rs. v. Chicago & Northwestern R.R.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963). The problems before the Eighth Circuit Court of Appeals,

insofar as they are relevant to the instant case, are perhaps best stated by the trial court, reported as *Chicago & Northwestern R.R. v. Brotherhood of Locomotive Eng'rs.*, 202 F. Supp. 277, 283 (S.D. Iowa 1962):

> "The basic question presented herein is, whether the parties are required to follow the procedures of the Railway Labor Act (45 U.S.C.A. § 151 et seq.) in effecting the proposed coordination of Northwestern's railroad yards at Marshalltown, Iowa, or whether the parties are required to follow the procedures prescribed by the 'stipulation' entered into by the parties and authorized by the Interstate Commerce Commission in its order approving the merger under the provisions of Section 5(2) (f) and Section 5(11) of the Interstate Commerce Act, 49 U.S.C.A. §5(2) (f), 5(11)."

The District Court held that the Railway Labor Act was inapplicable, and that the parties were required to follow the procedures in the stipulation incorporated in the I.C.C. order.

The Court of Appeals, in affirming the decision of the District Court, considered the policy reasons behind the enactment of § 5(2) (f), and the effect which the Railway Labor Act would have upon Section 5 transactions, noting especially the defeat of the Harrington Amendment. That amendment would have required disapproval of any transactions which would cause *any* change in the existing employment rights of affected employees, and was seen as having the effect of preventing all consolidations to which it related. *Railway Labor Executives' Association v. United States*, 339 U.S. 142, 151 (1950). The 8th Circuit went on to state at page 430:

> "The Harrington amendment was defeated. We believe that that italicized sentence clearly points out the Court's view that the ICC power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist. * * * Like the Harrington amend-

> ment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations."

The defendant in the instant case argues that because the *Northwestern* case involved a "major dispute" within the framework of the Railway Labor Act, and this case involves a "minor dispute," the two fact situations are distinguishable. In the *Northwestern* case, the defendant union urged that the dispute was a major dispute which must be resolved according to the procedures set out in § 6 of the Railway Labor Act. The Court stated at page 428:

> "We do not deem it necessary to determine whether the dispute here involved is major or minor within the meaning of the Railway Labor Act. * * * If either a major or minor dispute exists here and if the Railway Labor Act applies under the present factual situation, exclusive jurisdiction for resolution of the dispute would rest in the instrumentalities established by the Railway Labor Act."

Of course, the Court of Appeals went on to affirm the trial court's holding that the parties were relieved from the requirements of the Railway Labor Act by virtue of 49 U. S. C. § 5(11), so the classification of disputes by the Railway Labor Act was never an issue in the case. Similarly, in the case at bar, this Court cannot accept the contention that the classification of this dispute as minor serves to distinguish this case from *Northwestern,* nor can it agree with the defendant's statement that there is nothing in that opinion which is inconsistent with the Railroad's claim here that exclusive jurisdiction lies with the Adjustment Board. While it is generally true that no two cases are exactly alike, and the *Northwestern* case when compared to the instant controversy is not an exception to that general rule, they are enough alike in all material respects that the case is authority for the plaintiff's position here on the question of jurisdiction. The *Northwestern* court, after considering three Supreme Court cases dealing with legislative history and public

policy reasons behind the enactment of 49 U.S.C. § 5(2) [*Brotherhood of Maintenance Ass'n Employees v. United States,* 366 U.S. 169 (1961); *Railway Labor Executives' Ass'n v. United States,* 339 U.S. 142 (1950); *United States v. Lowden,* 308 U.S. 225 (1939)], stated at page 431:

> "While the three Supreme Court cases just discussed do not deal directly with the specific problem now confronting us (namely, whether the provisions relating to merger and providing for compensation for affected employees take precedence over the provisions of the Railway Labor Act) in the situation here presented we believe that the cases afford very substantial support for the view that Congress intended the I.C.C. to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers. Thus, like the trial court, we come to the conclusion that to hold otherwise would be to disregard the plain language of Section 5(11) conferring exclusive and plenary jurisdiction upon the I.C.C. to approve mergers and relieving the carrier from all other restraints of federal law.
>
> "Unquestionably, the Railway Labor Act is a federal law. We find no express or implied exception of the provisions of the Railway Labor Act from the operative provisions of Section 5(11)."

As the Court points out in a footnote,[1] Congress has demonstrated its ability expressly to exclude the Railway Labor Act from the operation of a statute such as 49 U.S.C. § 5, for the proviso attached to Title I § 10(a) of the Emergency Railroad Transportation Act of 1933 does exactly that.[2] The omission of any such proviso in § 5(11) indicates a congressional intent to include the Railway Labor Act as a "federal restraint" from which the parties to an I.C.C. § 5(2) proceeding are relieved. Defendants argue further, however, that even if a suit based upon a

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[1] 314 F.2d 424, 432 n. 2 (8th Cir. 1963).

[2] 48 Stat. 211, 215.

Section 5(2) I.C.C. order may be properly brought in a District Court, the instant suit is based upon alleged violations of a collective bargaining agreement between the railroad and the union, such as is contemplated by the last sentence of § 5(2)(f), and not upon any I.C.C. order. Therefore, the argument runs, the National Railroad Adjustment Board has exclusive jurisdiction, since the cause of action is based upon an ordinary collective bargaining agreement. Defendant cites the case of *Arnold v. Louisville & Nashville Rd. Co.*, 180 F. Supp. 429 (M.D. Tenn. 1960), *aff'd sub. nom. Batts v. Louisville & Nashville Rd. Co.*, 316 F.2d 22 (6th Cir. 1963), as direct authority for this proposition. The last sentence of § 5(2)(f) provides as follows:

> "Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

Plaintiffs do not dispute that this language contemplates the making of subsequent agreements between the parties to a merger or acquisition, and that if such later contracts are not incorporated into the § 5(2)(f) order, then suits upon them are upon the contract and not upon the order. Plaintiffs instead contend that since the agreement here was made in 1962, and incorporated in the order in 1964, the provisions of the agreement which are the basis of the suit were not made "hereafter," but rather are an integral part of the original order. Defendant suggests that the word "hereafter" is intended to mean after the date of enactment of the section, and that when a suit is based upon any agreement between the parties to the Section 5 transaction, and not upon provisions having an independent source from party contracts which are merely inserted by the I.C.C. as "boilerplate" provisions, then *Arnold, Batts,* and the Railway Labor Act require the plaintiffs to proceed upon the private agreement in the normal fashion. That is, defendants contend that in such a case, plaintiffs

must exhaust all remedies in the agreement and then proceed to their remedies under the Railway Labor Act, and they are not entitled to sue upon the order in the federal courts. This Court does not read *Arnold, Batts,* and *Cantrell*[3] to hold that the Railway Labor Act divests this Court of jurisdiction in cases of this nature. These cases instead stand for the proposition that plaintiffs suing upon an agreement made after the I.C.C. order but incorporated within it, are compelled, notwithstanding the provisions in Title 49 allowing suits in the District Courts, to exhaust any remedies found within the agreement before they may be heard in court. An important distinction between *Arnold* and the instant case is that the former involved a situation where the parties to the I.C.C. order supplemented the protective conditions contained in that order with a subsequent agreement. Clearly the District Court had to hold them bound by the arbitration provisions of that later agreement and not allow suit on the former provisions alone, else subsequent agreements and the last sentence of § 5(2).(f) alluded to above would be rendered meaningless. This Court is unable to agree with the defendant that the intended purport of the word "hereafter" is after the enactment of the section, instead of after the date of entry of the I.C.C. order. The language of the opinions in *Arnold* and *Batts* does not even support this interpretation, nor do the other cases cited by both parties which deal with § 5(2)(f). In an additional case involving a clash between the policies of the Interstate Commerce Act and the Railway Labor Act, a federal court had occasion to consider the decision in *Arnold,* and the *Arnold* Court's interpretation of the sentence at issue, stating:

> "The proper meaning of this clause, we believe, was provided in *Arnold v. Louisville & Nashville Rd., supra.* There the Court decided that any supplementary agreement between the authorized representative and the carriers must be *adoptive, supplementive*

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[3] *Cantrell v. Louisville & Nashville Rd. Co.,* 316 F.2d 22 (6th Cir. 1963); (a companion case to *Batts, supra*).

> or *implementive,* and that any agreement must deal with the same subject matter as the I.C.C. order. * * *"[4]

It is apparent that the *Clemens* court, as well as the *Arnold* court, interpreted the word "hereafter" in § 5(2)(f) to refer to agreements entered into after the date of the I.C.C. order, and this Court is similarly of the opinion that such a construction is the only proper one. In *Clemens, supra,* the I.C.C. order approving an acquisition included the protective terms of the Washington Job Protection Agreement of 1936, and at a later date, the unions and railroads involved entered into an agreement which seriously abrogated the benefits due employees upon retirement at age sixty-five. One of the many issues presented by the case was whether the plaintiffs, employees who had been terminated at age sixty-five without pay pursuant to this new agreement, could bring their claims of being entitled to benefits under the original I.C.C. order in the federal courts under 28 U.S.C. § 1336. That, of course, is one of the jurisdictional sections invoked by plaintiffs here, and the defendant here, as in *Clemens,* is arguing that the *Arnold* and *Batts* cases preclude jurisdiction in the courts. On this issue, the Court's statement, in pertinent part, was as follows:

> "The plaintiffs rely also on 28 U.S.C. § 1336 which they contend provides an alternate ground of jurisdiction. * * * The defendants argue that *Arnold v. Louisville & Nashville Rd.,* 180 F. Supp. 429 (M.D. Tenn. 1960), *aff'd sub nom. Batts v. Louisville & Nashville Rd. Co.,* 316 F.2d 22 (6th Cir. 1963) supports their contention that this section also does not confer jurisdiction. This argument must be rejected.
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> "In *Arnold,* * * * the Court held that the action could not be sustained under 28 U.S.C. § 1336. Specifically, the Court held that the plaintiffs' rights were founded not upon the I.C.C. order but upon a sub-

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[4] *Clemens v. Central Railroad Company of New Jersey,* 264 F. Supp. 551 (E.D. Pa. 1967).

> sequent agreement entered into by the unions and carrier *supplementing* that order. The agreement in *Arnold* was significantly different from that in the instant action, because it did not undertake to abrogate any benefits imposed by the Commission for the protection of adversely affected employees, but, on the contrary, sought to supplement them. * * *" (264 F. Supp. 551, 560,)

It must be kept in mind that in the case at bar, plaintiffs are not suing upon *any* agreements which supplement, implement, or abrogate an I.C.C. order: they are suing upon the order itself, and the protective terms originally embodied within it.

The plaintiffs cite *Swacker v. Southern Ry. Co.*, 360 F.2d 420 (4th Cir. 1966), as well as other federal cases, in support of the proposition that suits upon I.C.C. Section 5 orders are properly brought in the federal district courts. Defendant attempts to distinguish *Swacker* from the case at hand on the ground that the protective order there did not contain provisions derived from agreements between the parties, but rather from the *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271. This Court is unable to see what legal effect should be attached to the *source* of the conditions imposed by the Commission pursuant to the mandate of Section 5(2)(f). Whether the protective terms have their genesis in other merger cases, or prior agreements between the parties subject to the order of approval about to be entered by the Commission, should make no difference; the provisions set forth or incorporated by reference in the original I.C.C. order form the basis of the employees' rights. *Brotherhood of Locomotive Engineers v. Chicago & Northwestern Railway Company, supra,* involved a situation where the protective provisions of the I.C.C. order were based upon a stipulation between the carrier and representatives of the employees, entered into before the order but incorporated within it, and the Court held that it *had* jurisdiction to enforce the terms and conditions of that order. The distinction which the defendant seeks to impose here, based

upon the source of the protective provisions, is not supported by either Title 49, the case law, or reason, and accordingly must be rejected.

In summary, the first branch of defendant's motion to dismiss, based upon the contention that the Court lacks jurisdiction of the subject matter, is not well taken, and will be overruled to that extent.

Defendants also contend that the suit should be dismissed because the plaintiffs have failed to exhaust their administrative remedies. Defendants argue that Section 1(d) of the agreement between the parties made in 1962 contains an arbitration clause, and the plaintiffs have not shown an exhaustion of this remedy. Even if they have exhausted the contractual remedies, or are excused from doing so by the union's inactivity on their behalf, the defendant further contends that plaintiffs have not exhausted their remedies before the Railroad Adjustment Board pursuant to Section 3 First (i) of the Railway Labor Act. Defendant cites several United States Supreme Court cases and an Ohio case as authority for the proposition that administrative remedies must be exhausted before a party may seek judicial relief. Defendant's argument that the plaintiffs have not exhausted their remedies before the Railroad Adjustment Board is clearly untenable in the face of 49 U.S.C. § 5(11) and this Court's holding that plaintiffs are relieved from the restraints of the Railway Labor Act. With regard to defendant's contention that the plaintiffs have not exhausted their administrative remedies under the incorporated agreement of 1962 and other union procedures, a reading of the affidavit of Joseph E. Fitz, local chairman of Lodge 844, reveals that these plaintiffs have reached a deadend street in their attempts to utilize internal union remedies. The doctrine of exhaustion of administrative remedies presupposes the *existence* of adequate and effective remedies. *Marsh v. County School Board of Roanoke County, Va.*, 305 F.2d 94, 98 (4th Cir. 1962). The only remedy which the plaintiffs even arguably should have to exhaust is the provision for arbitration in Section 1(d) of the 1962 agreement, and it does

appear that in many of the cases cited by both parties, the courts, although taking jurisdiction, have required arbitration pursuant to the provision in the I.C.C. order. However, in all the cases this Court has considered where the arbitration clause was *permissive* in language rather than mandatory, as it is in the instant case, one of the parties to the litigation was actively seeking to arbitrate the dispute. The holdings of these various courts are not that arbitration must be utilized in all cases before a party can bring the claim before the federal courts on the merits, but rather that where one of the parties has *invoked* the arbitration clause exercising his election under the permissive language, then the dispute *must* be settled by an arbitrator, or the clause would be meaningless.[5] In the case at bar, the plaintiffs through their local chairman attempted in vain to invoke the arbitration clause, and failing to have their claims adjudicated in that manner, now have exercised their right of election to pursue their statutory remedies in the courts. The defendant not having exercised its right to "refer such dispute to an arbitration committee for consideration and determination," the arbitration clause has not taken on a mandatory character under the cases cited in the above footnote. Plaintiffs here are attempting to pursue a remedy specifically created by Congress in 49 U.S.C. §§ 9, 16(12). These statutory provisions are clear on their face, and make no reference to any administrative exhaustion as a mandatory prerequisite. Undoubtedly, Congress in its wisdom foresaw the likelihood of railroad mergers and acquisitions resulting in economic chaos for the employees affected, and political upheaval within the Brotherhood's local lodges. Employees in such a transitory process are in all probability going to find themselves in a weaker position than those not affected with respect to exerting influence upon their bargaining

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[5] *New Orleans and North Eastern R.R. Co. v. Bozeman*, 312 F.2d 264, 268 (5th Cir. 1963); *Batts v. Louisville and Nashville R.R. Co.*, 316 F.2d 22, 26 (6th Cir. 1963); *Brotherhood of Railroad Trainmen v. Chicago River and Indiana R.R.*, 353 U.S. 30, 34, 35 (1957); *Gillikin v. Atlantic & East Carolina Ry.*, 120 S.E.2d 847, 858, 255 N.C. 228 (1961).

representatives. To avoid undue hardships to these employees from conditions not of their own making, Congress has empowered the I.C.C. to insert provisions for their protection before any such transactions are approved, and allowed the employees affected to come into the federal courts with their claims, exempting them for a short period from the normal avenues of settling railway labor disputes. Indeed, the very situation presented to this Court is probably characteristic of that which Congress envisaged when it enacted 49 U.S.C. §§ 5, 8, 9, and 16, and 28 U.S.C. §§ 1336, 1337. For the reasons above, then, it is the opinion of this Court that the plaintiffs are not required to exhaust any other remedies, and have properly presented their claims in a "district court of the United States of competent jurisdiction."

The defendant in its motion to dismiss has also raised a claim of accord and satisfaction, in that the plaintiffs' claims have all been settled. The defendant has attached to its motion the affidavit of Fred S. Yancey, Wage Supervisor for the Norfolk and Western Railway, and various exhibits. Since this amounts to an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure, it cannot be the basis of a motion to dismiss. *Topping v. Fry*, 147 F.2d 715 (7th Cir. 1945). However, Rule 12(b) expressly provides that when such a defense is accompanied by affidavits and exhibits such as is the case here, it may be treated as a motion for summary judgment under Rule 56. The defendant's affidavit states that "all merger-connected claims filed on behalf of the plaintiffs named in this action have been disposed of by agreement between the representative of the Norfolk and Western and the General Chairman of the Brotherhood of Railroad Trainmen, and no dispute exists," and several of the exhibits attached are copies of correspondence concerning the payment of sums allegedly owing these plaintiffs. Plaintiffs, however, contend that there was never any intent on their part to accept the amounts they received as anything else but a partial payment of what is owed them under the I.C.C. order.

When a defendant pleads the affirmative defense of accord and satisfaction, it assumes the burden of establishing that defense, *Scheanwald v. Economy Savings & Loan Company,* 189 N.E.2d 731 (Ohio App. 1960) and it has gone forward by setting forth facts upon which this defense could be made out. Since there appears to be a bona fide dispute between these parties, resulting in an unliquidated amount being owed the plaintiffs under the I.C.C. order, settlement for a lesser sum could form an accord and satisfaction as settlement of the dispute would constitute the consideration. *Chandler v. State Highway Bd.,* 61 F.2d 601 (5th Cir. 1932). However, it is also established law that there can be no accord and satisfaction of a disputed claim unless the creditor accepts the lesser amount with the *intention* that it constitute a settlement of the claim, *Vilter Mfg. Co. v. Rolaff,* 110 F.2d 491, 498 (8th Cir. 1940), and the plaintiffs here allege that there was never any such intention, raising a material question of fact. A plaintiff's motion for summary judgment must be denied if affirmative defenses raise matters, which, if proven, may possibly preclude a judgment in favor of the plaintiff as a matter of law, *Velsicol Corporation v. Hyman,* 103 F. Supp. 363, 366 (D. Colo. 1961), and the defendant can not contend that it has established the defense from its affidavits and exhibits, in the face of the plaintiffs' claims of there being no intention to settle. Therefore, neither of the cross motions for summary judgment on this matter may be granted. At this time, the Court will reserve its ruling upon the plaintiffs' rights under the actual terms incorporated in the I.C.C. order. Plaintiffs' prayer for a special master and injunctive relief of a permanent nature cannot be granted in summary fashion, since their rights upon the order have not yet been determined, and questions of fact remain to be resolved. Therefore, both of the parties' motions for summary judgment must be denied. An order will be prepared accordingly.

/s/ DON J. YOUNG,
United States District Judge.

Toledo, Ohio.

ANSWER.

(Filed September 4, 1968.)

First Defense.

For its Answer to plaintiffs' Complaint as amended, defendant pleads as follows:

1. Defendant denies each and every allegation contained in paragraph 1 of the Complaint.

2. For want of knowledge, defendant denies each and every allegation contained in paragraph 2 of plaintiffs' Complaint.

3. Defendant admits the allegations contained in paragraphs 3, 4, 5, 6 and 7 of plaintiffs' Complaint.

4. Defendant denies each and every allegation contained in paragraph 8 of plaintiffs' Complaint.

5. Defendant admits the allegations contained in paragraph 9 of plaintiffs' Complaint.

6. Defendant denies each and every allegation contained in paragraphs 10 and 11 of plaintiffs' Complaint.

7. Defendant admits the allegations contained in paragraphs 12, 13, and 14 of plaintiffs' Complaint.

8. Defendant denies each and every allegation contained in paragraph 15 of plaintiffs' Complaint.

9. Defendant admits the allegations contained in paragraphs 16, 17, 18 and 19 of plaintiffs' Complaint.

10. Defendant denies each and every allegation contained in paragraphs 20, 21, 22, 23 and 24 of plaintiffs' Complaint.

11. Defendant admits that it has paid to plaintiff Richard Nemitz the sum of $1,689.61, to plaintiff L. J. Wuertz the sum of $1,072.20, to plaintiff Martin Riley the sum of $3,452.84, and to plaintiff Joseph Fitz the sum of $1,558.90, all as alleged in paragraphs 25, 26, 27 and 28 of plaintiffs' Complaint, but defendant specifically denies each and every other allegation contained in said paragraphs 25, 26, 27 and 28 of plaintiffs' Complaint.

12. Defendant denies each and every allegation contained in paragraphs 29 and 30 of plaintiffs' Complaint.

13. Defendant admits the allegations contained in paragraph 31 of plaintiffs' Complaint except for the language, "defendant railway in violation of federal law as aforesaid," contained in line 9 thereof, which defendant specifically denies.

14. Defendant denies each and every allegation contained in paragraph 32 of plaintiffs' Complaint.

Second Defense.

15. All of the merger-connected claims of plaintiffs and others similarly situated have been settled by agreement between defendant and plaintiffs' duly authorized agent, Brotherhood of Railroad Trainmen, through its duly designated General Chairman, J. F. McNeel, acting within the scope of his authority.

16. Said settlement agreement was entered into because of a bona fide dispute over the claims of plaintiffs and others similarly situated and defendant. The consideration supporting said settlement agreement was certain sums of money paid to plaintiffs and others similarly situated in return for promises by plaintiffs' said agent that plaintiffs and others similarly situated would withdraw their said claims. Said payments were accepted by plaintiffs and others similarly situated in full satisfaction of their claims against defendant.

17. As a result of the said settlement agreement and acceptance of the said sums by plaintiffs and others similarly situated, there has been a full accord and satisfaction between defendant and plaintiffs and others similarly situated.

Third Defense.

18. Defendant incorporates the allegations contained in paragraphs 15, 16 and 17 hereinabove as if fully rewritten herein.

19. Further pleading, defendant says that Brotherhood of Railroad Trainmen, in entering the said settlement agreement, was, in accordance with the provisions of the Washington Job Protection Agreement of 1936, the merger agreement designated as plaintiffs' Exhibit A, and other documents, held out as the authorized agent of plaintiffs and others similarly situated and was acting within the scope of that authority; that defendant relied upon that authority to its detriment; and, that as a result, plaintiffs and others similarly situated are estopped to deny such authority of the said Brotherhood of Railroad Trainmen even if such authority, in fact, did not exist.

Fourth Defense.

20. Further pleading, defendant says that the Court lacks jurisdiction of the subject matter for the reason that exclusive, primary jurisdiction is vested in the National Railroad Adjustment Board under § 3 First of the Railway Labor Act (45 U.S.C.A. § 153 First).

Fifth Defense.

21. Further pleading, defendant says that there has been no exhaustion or attempted exhaustion of administrative remedies available to plaintiffs under the applicable agreements between defendant and the Brotherhood of Railroad Trainmen under § 3 First of The Railway Labor Act.

WHEREFORE, defendant prays that plaintiffs' Complaint be dismissed at their costs.

/s/ JOHN M. CURPHEY,
/s/ ROBISON, CURPHEY & O'CONNELL,
Attorneys for Defendant.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

(Filed August 7, 1969.)

Plaintiff moves the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in the complainants' favor as to the second and third defenses set forth in the defendant's Answer, on the ground that there is no genuine issue as to any material fact with respect to these defenses and that complainant is entitled to judgment as a matter of law.

/s/ THOMAS J. MURRAY,
MURRAY & MURRAY,
Attorneys for Complainants.

STIPULATION AND ORDER.

(Filed August 21, 1969.)

It is stipulated and agreed by and between counsel for the respective parties hereto that copies of agreements identified below, attached hereto and marked as indicated, may be received in evidence at the trial of this cause without further proof as to authenticity. It is also agreed that like copies similarly marked may be used during depositions prior to trial without further identification and that the copies attached hereto may be used in connection with any motions hereafter filed. It is further agreed that the descriptions of the joint exhibits contained herein are made solely for the purpose of identifying the documents involved and that the descriptive language is in no way intended to bear upon or affect the legal significance of the contents of these documents; and the parties signatory hereto waive any right to use any descriptive language for any purpose whatever with respect to this cause other than for the sole purpose of identifying the exhibits involved.

Joint Exhibit 1. Agreement for the protection of employees effective January 10, 1962, between the Norfolk and Western Railway Company and 20 national labor organizations in the event of approval of merger and related applications filed by Norfolk and Western and other carriers in I.C.C. finance docket Nos. 21510, etc. consisting of 14 pages without attached appendices.

Joint Exhibit 2. Memorandum of Understanding effective January 10, 1962, between the same parties providing in paragraph 1 thereof for advance notice in case of furloughs, etc. (four pages).

Joint Exhibit 3. Memorandum of Understanding effective January 10, 1962, between the same parties providing that the Agreement for the protection of employees shall not be construed to limit the rights of the parties to change agreements through national handling in the industry (two pages).

Joint Exhibit 4. Memorandum of Understanding effective January 10, 1962, between Norfolk and Western and four operating organizations providing a formula for the determination of displacement allowances (three pages).

Joint Exhibit 5. Stipulation and Agreement undated providing that the Agreement for the protection of employees shall be applied for their protection in the event the Commission approves pending applications, notwithstanding opposition of the labor organizations (two pages).

Joint Exhibit 6. Interstate Commerce Commission report decided June 24, 1964, Norfolk and Western Railway Company and New York, Chicago and St. Louis Company—merger, etc.

Joint Exhibit 7. Memorandum of Understanding dated October 9, 1964, between Norfolk and Western Railway Company and the Brotherhood of Railroad Trainmen, Brotherhood of Locomotive Engineers, and Brotherhood of Locomotive Firemen and Enginemen, providing for the orderly transition of Pennsylvania employees who elected

to accept employment with the Norfolk and Western pursuant to the agreement for the protection of employees represented by Joint Exhibits 1 through 4 herein.

Joint Exhibit 8. Implementing Agreement dated October 27, 1964, between Norfolk and Western and the Brotherhood of Railroad Trainmen providing that Norfolk and Western would take into its employment the employees listed in attached "Exhibit A" who were eligible under the provisions of Section 3 of the Agreement represented by Joint Exhibit 1 herein.

Joint Exhibit 9. Implementing Agreement 1-A between Norfolk and Western and the Brotherhood of Railroad Trainmen and Brotherhood of Locomotive Firemen and Enginemen.

Joint Exhibit 10. Letter of Understanding from the Norfolk and Western to the Brotherhood of Railroad Trainmen dated October 25, 1965, providing for temporary compensation under existing agreements for the protection of the employees.

Notice by the Clerk under Rule 77(a) F.R.C.P. is hereby waived.

IT IS SO ORDERED.

/s/ DON J. YOUNG,
United States District Judge.

/s/ THOMAS J. MURRAY,
/s/ MURRAY & MURRAY,
Attorneys for Plaintiff.

/s/ JOHN M. CURPHEY,
/s/ ROBISON, CURPHEY & O'CONNELL,
Attorneys for Defendant and Third Party Plaintiff.

/s/ ROBERT HART,
Attorney for Third Party Defendant.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

(Filed September 2, 1969.)

Defendant, Norfolk and Western Railway Company, respectfully moves this Court for an order granting a summary judgment in its favor under Federal Rule 56 for the reason that the Court has no jurisdiction over the subject matter, and therefore there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law.

/s/ JOHN M. CURPHEY,
/s/ E. THOMAS MAGUIRE.

OPINION OF THE COURT.

(Filed December 19, 1969.)

YOUNG, *J.*

On October 16, 1964 the New York, Chicago & St. Louis Railroad (hereinafter referred to as the Nickel Plate) was merged into the Norfolk & Western Railway (hereinafter referred to as the N&W) with the N&W as the surviving entity. The transaction involved the assumption of control of several smaller lines by the combined company. Among these was the so-called Sandusky Line from Columbus, Ohio, to Sandusky, Ohio, purchased from the Connecting Railroad which was a subsidiary of the Pennsylvania Railroad[1] (hereinafter referred to as the Pennsy). The Sandusky Line, although legally a separate entity, had been operated as a part of the Toledo Division of the Pennsy. The seniority district of at least one union, The Brotherhood of Railroad Trainmen here involved, embraced the entire Toledo Division. Trainmen not able to

[1] It is interesting to note that the Pennsy at that time controlled the N & W by virtue of ownership of a large portion of its stock. It is also interesting to note that the President of the N & W at the time of the merger was soon thereafter made President of the Pennsy.

find work on the Sandusky Line could and according to the undisputed evidence did indeed seek work at other points in the Toledo Division.

The effect of the merger was to split this seniority district, thereby limiting the Sandusky Line employees to the work available on the Sandusky Line alone. It is this splitting of the seniority district which laid the basis for the present controversy.

The Sandusky Line, while carrying a large amount of agricultural products and general merchandise, was heavily employed for transporting coal to the Pennsy's coal docks at Sandusky. Navigation on Lake Erie being primarily a seasonal matter, much of the employment on the Sandusky Line was seasonal in nature. In light of the total wages which the plaintiffs claim to have received on the Pennsy, the ability to work throughout the Toledo Division must have been of great economic importance to them.[2]

The N&W was desirous of obtaining the Sandusky Line since it provided a much needed connection between the existing N&W rail head at Columbus and the Nickel Plate system. Since the N&W was primarily a coal carrier, it had the added advantage of providing the N&W with a single line potential for its coal shipments, thereby eliminating rate sharing.

At the time of the merger the employees of the Sandusky Line were given the option of going with the N&W or remaining in the employment of the Pennsy. Where an employee elected to take employment with the Pennsy, the Pennsy employee displaced thereby would have the option of electing to take employment with the N&W on the same terms as the employee who displaced him.

Prior to the completion of the merger the unions entered into an agreement with the N&W regarding protective provisions for the employees affected by the merger.

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[2] Plaintiff Richard Nemitz received a total wage from the Pennsy in the 12 months preceding October 16, 1964 of $7,000 and after the merger he earned on the Sandusky Line in the 24 month period following October 16, 1964 an amount of $3,303.13.

These are before the Court as Joint Exhibits 1 through 4. Such agreements are entered into to provide the basis for the protective order which the Interstate Commerce Commission (hereinafter referred to as the I.C.C.) is required to enter by statute. 49 U.S.C. § 5(2)(f) reads:

> As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

These agreements applied to all of the employees on all of the lines affected by the merger with the exception of the A.C.Y.R.R. and the Pittsburgh & West Virginia R.R. The Commission adopted them as part of its protective order:

> Based upon studies made on the Norfolk & Western, Nickel Plate, and Wabash for the 5-year period 1956 through 1960 respecting the usual turnover in employment by reason of retirements, resignations,

deaths, and dismissals for cause, it appears that the proposed merger, lease, and purchase would have little or no adverse effect on the carriers' employees. The studies reveal that the turnover, termed "normal attrition," averaged 4,314 employees annually for the 5-year period. Based upon that average and the plan of operation to be undertaken by the new system, applicants expect that substantially more jobs will become available on the combined system within one year after the unification than the net number of jobs expected to be eliminated as a result thereof.

Norfolk & Western has entered into an agreement with 19 of the principal labor organizations, members of the Railway Labor Executives' Association, for the protection of employees of Norfolk & Western, Nickel Plate, and Wabash, as well as persons employed on the Sandusky line of Pennsylvania, represented by these organizations. This agreement, which provides for the assumption by Norfolk & Western of all outstanding labor contracts, schedules and agreements of Nickel Plate and Wabash, as well as those having application on the Sandusky line, basically requires that job eliminations as a result of the unification be accomplished only through normal attrition. Under its terms, Norfolk & Western agrees to take into its employment, upon consummation of the merger, lease, and purchase, all employees of the lines involved with the guarantee that they will not be adversely affected in their employment as a result of the proposed transactions or for any reason other than furloughs due to seasonal requirements or a decline in volume of traffic or revenue.

* * * * *

It was stipulated that under any report and order approving the proposed merger, lease, and purchase it may be considered that these agreements were made pursuant to and in conformity with section 5(2)(f) of the act for the protection of the covered employees. Joint Exhibit 6 pp. 89-90.

The principal agreement between the N&W and the unions was signed on April 16, 1962 and was effective according to its terms on January 10, 1962, but did not actually go into effect until the merger was consummated. The agreement provides that the employees shall be entitled to the protection afforded by the Washington Job Protection Agreement and provided additional special arrangements for employees the various carriers involved. Section 3 of this agreement provides:

> On the effective date of the acquisition by Norfolk & Western of the Sandusky Line presently operated by the Pennsylvania Railroad, approval for which is sought in Finance Docket No. 21512, Norfolk & Western will take into its employment all employees represented by the labor organizations signatory hereto, except those on furlough or leave of absence as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated, who during such period have exercised employment rights on said Sandusky Line and elect to accept such employment; provided, however, that in the event two or more employees, including those on leave of absence, have employment rights to the same job, said employees will be protected hereunder and their employment preserved only to the extent of their individual equities in said job; and provided further, however, that none of such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment except that Norfolk & Western shall not be required to provide employment to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition. In the event any such employee elects not to accept such employment and in lieu thereof exercises employment rights on the Pennsylvania Railroad, Norfolk & Western agrees to offer em-

ployment to the employee of the Pennsylvania Railroad ultimately displaced by the return of said employee, who elects to accept such employment. Pennsylvania Railroad employees accepting such employment shall be entitled to all the protective benefits of this Section provided that Norfolk & Western shall not be required to provide employment or compensation to any such employee during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed by and paid to the Sandusky Line employee, who caused such Pennsylvania Railroad employee to be displaced, in the twelve months' period immediately preceding the effective date of said acquisition.

Employees protected under this Section shall not be regarded as deprived of employment or placed in a worse position with respect to compensation in case of their resignation, death, retirement, dismissal for cause in accordance with existing agreements, failure to work due to disability or discipline in accordance with existing rules or agreements or furlough because of reduction in forces due to seasonal requirements as aforesaid or decline in volume of traffic or revenues.

The method of determining the protective benefits was set forth in Joint Exhibit 4 which was dated January 10, 1962 and basically provided for determination of the average monthly compensation of the employee for the last 12 months before the merger in which he performed service and supplementing monthly earnings each month to reach that amount. This agreement likewise was drawn to cover all of the employees of all of the carriers affected by the merger.

The dispute before this Court is basically that the plaintiffs claim that they have not received all of the protective benefits to which they are entitled. The N&W has disputed this and has questioned the jurisdiction of this Court to hear this controversy. The Court has previously ruled that this matter does not have to be submitted to

arbitration under the Railroad Labor Act or under the ICC order and will adhere to that ruling insofar as it pertains to the basic dispute. There are, in addition, several other jurisdictional questions which the Court has not had the benefit of extensive briefing by counsel on, but which the Court will undertake to resolve as it reaches that portion of its analysis of the dispute.

Basically, the N&W claims that it has an agreement executed pursuant to the last sentence of 49 U.S.C. § 5(2)(f) providing for the determination of protective benefits on the basis of plaintiffs' Sandusky Line earnings alone. Plaintiffs, the employees represented by the Brotherhood of Railroad Trainmen, claim that they are entitled to payments based upon their earnings for the entire Toledo Division prior to the merger.

The question of whether 49 U.S.C. § 5(2)(f) prescribes a minimum level of compensation appears to be one of first impression in the courts. The Supreme Court in *Railway Labor Executives Ass'n v. United States*, 339 U.S. 142 (1950) determined that the four year provision in the second sentence of 49 U.S.C. § 5(2)(f) prescribed the minimum duration of the protective benefits afforded by the carriers and the I.C.C. The Supreme Court was called upon to determine whether 49 U.S.C. § 5(2)(f) required a "job freeze" for a four year period following a merger. *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169 (1961). The Court there determined that the Congress did not intend a "job freeze," but that the compensation alone was required. In reaching this conclusion the Court reviewed the legislative history of the act and the interpretations given to the act by those most affected at the time of the passage of the bill. The result appears in the opinion as footnotes 7 and 8. *Ibid.* at 176-77. This clearly shows that Conference Committee Chairman Lea and the Brotherhood of Maintenance of Way Employees believed that the provision guaranteed the affected employees income for four years after the merger whether they were employed or not.

The I.C.C. promulgated certain conditions known as

the Oklahoma Conditions which form the basis of all I.C.C. protective orders since the passage of 49 U.S.C. § 5(2)(f).[3] After being partly reversed in the imposition of these conditions by the Supreme Court in *Railway Labor Ass'n v. United States*, 339 U.S. 142 (1950), the I.C.C. amended the Oklahoma Conditions by the addition of the Washington Job Protection Agreement with the Oklahoma Conditions as a minimum. *New Orleans Passenger Terminal Cases*, 282 I.C.C. 271 (1952).[4] The resulting conditions became known as the New Orleans Conditions. It was these conditions which were involved in *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169 (1961). There the Court described the conditions as follows:

> Briefly, the New Orleans conditions prescribe the following: employees retained on the job but in a lower paying position get the difference between the two salaries for four years following the merger; dis-

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[3] *Oklahoma Ry. Co.—Trustees Abandonment*, 257 I.C.C. 177 (1964). These conditions provide in part:

§ 4. If, as a result of the abandonment of operation herein permitted, * * *, any employee, * * *, is displaced, that is, placed in a worse position with respect to his compensation and rules governing his work conditions, and so long thereafter as he is unable, in the exercise of his seniority rights under existing agreements, rules, and practice, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation received by him in the position from which he was displaced. 257 I.C.C. at 197.

There is also a provision for wage guarantee if he leaves employment providing that the guarantee (which itself is a rough rule of thumb on how much will be lost by taking new employment) shall be paid only to bring the wages up to the point they were at at the time of the merger.

[4] "The Oklahoma conditions differ [from the Washington Job Protection agreement] in that they prescribe 100% protection [of wages] for a maximum period of 4 years from the effective date of the Commission's order." *New Orleans Passenger Terminal Cases*, 282 I.C.C. 271 (1952).

> charged employees get their old salaries for four years, less whatever they make in other jobs, or they may elect a lump sum payment; transferred employees get certain moving expenses, and certain fringe benefits are insured; and any additional benefits that a given employee would have received under the Washington Job Protection Agreement, * * * are guaranteed. *Brotherhood of Maintenance of Way Employees v. United States,* 366 U.S. 169, 171 n. 1 (1961).

When all of these factors are taken together, particularly in light of the fact that the Oklahoma Conditions were promulgated at a time when the I.C.C. believed that the four year provision of 49 U.S.C. § 5(2)(f) was considered to prescribe the maximum protective benefits allowable, this Court is compelled to the conclusion that 49 U.S.C. § 5(2)(f) requires a wage freeze for four years after the consummation of the merger as the minimum protective benefits.

It now becomes necessary for this Court to determine whether this wage freeze applies only to those wages earned on the Sandusky Line or pertains to the entire earnings of the plaintiffs throughout the Toledo Division of the Pennsy. Again, no court has reported a case involving protective benefits arising from the sale of a portion of a railroad which split a seniority district. As far as the plaintiffs are concerned, the sale of the Sandusky Line by the Pennsy to the N & W is the same as if the Pennsy had been merged into the N & W and all of the Pennsy Toledo Division lines except the Sandusky Line had been abandoned. There could be no dispute that the plaintiffs' protective benefits would be calculated on the basis of their entire earnings in the Toledo Division, not just on that portion of the Division which had not been abandoned, namely, the Sandusky Line. Plaintiffs in the case before the Court are precluded from working throughout the Toledo Division just as surely as they would be in the hypothetical case. To draw a distinction between

the instant case and the hypothetical would be to do violence to the intent of Congress in enacting this statute and to place the form of the transaction over the substance of the merger. The Court holds that 49 U.S.C. § 5(2)(f) requires that the N & W calculate plaintiffs' protective benefits on the basis of plaintiffs' earnings for the entire Toledo Division.

Attention must now be turned to whether defendants' position that protective benefits are to be calculated on the basis of Sandusky Line earnings alone is frozen into the I.C.C. order, which would divest this Court of jurisdiction.[5] The Court has heretofore set forth the language of the I.C.C.'s order and the language of the agreement between the union and the carriers which the I.C.C. incorporated as part of its order. The I.C.C. interpreted the agreement between the unions and the N & W to say that "* * * Norfolk & Western agrees to take into its employment upon consummation of the merger, lease, and purchase. all employees of the lines involved with the guarantee that they will not be adversely affected in their employment as a result of the proposed transactions or for any reason other than furloughs due to seasonal requirements or a decline in volume of traffic or revenue." Joint Exhibit 6, p. 89. The I.C.C. is referring to the language in Joint Exhibit 1 which states "* * *, that none of such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment except that Norfolk & Western shall not be required to provide employment to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition * * *."

"Employees protected under this Section shall not be regarded as deprived of employment or placed in a worse

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[5] Cases to review an I.C.C. order pursuant to 28 U.S.C. § 1336 must be brought by or against the United States, 28 U.S.C. § 2322, and must be filed within 90 days after the date the Commission order becomes final, 28 U.S.C. § 1336(c).

position with respect to compensation in case of * * * furlough because of reduction in forces due to seasonal requirements as aforesaid or decline in volume of traffic or revenues." Joint Exhibit 1, pp. 9-10.

It appears from this that the I.C.C. order contemplated that plaintiffs' total wage could be reduced because of seasonal furlough or decline in revenue, but not because of the merger. Whether this complies with the Court's interpretation of 49 U.S.C. § 5(2)(f) is a question which this Court is without jurisdiction to consider since the action was not timely commenced, 28 U.S.C. § 1336(c), and because it was not properly brought, 28 U.S.C. § 2321 *et seq.* This Court must thus accept the I.C.C. provisions as being correct.

The loss of compensation due to the inability of the plaintiffs to perform work throughout the Toledo Division is not proximately caused by the seasonal requirements of defendant or a decline in volume of traffic or revenue. Rather it is the result of the merger narrowing the seniority district to the Sandusky Line alone. Plaintiffs are thus entitled to damages pursuant to 49 U.S.C. § 9 to the extent that their compensation has been diminished by the inability to perform work throughout the Toledo Division. They are not entitled to damages however for the extent that their compensation has been diminished by furlough due to seasonal requirements or because of any decline in volume of traffic or revenue which may have occurred.

The jurisdiction of this Court to entertain such a suit lies under 28 U.S.C. §§ 1331, 1336, 1337, 2321, and 49 U.S.C. § 9.

This Court is not unaware that the language of Joint Exhibit 1 says that employees shall not be placed in a worse position with respect to their employment except due to furloughs on account of seasonal requirements or decline in traffic or revenue, and that the language of Joint Exhibit 1 (p. 9) clearly differentiates between employment and compensation in another paragraph of the same section. The Court, however, will construe this in

the light which provides the least coverage, noting that the language of 49 U.S.C. § 5(2)(f) only speaks of employment but the term as therein used has been used to cover both employment and compensation. While this construction results in an inconsistency in the use of terms within Joint Exhibit 1, it is not the Court's intention that this construction be considered the determination of the actual intent of the parties.

The function of the Court in this case is not to construe totally and definitively the agreement between the defendant and the union which was adopted by the I.C.C. as its protective order; rather the Court's function is to delineate the minimal requirements of the law and the I.C.C. order in a situation where defendant's course of conduct with respect to the protective benefits guaranteed plaintiffs has not been in compliance with the law or the I.C.C. order. But the function of the Court is not to go beyond requirements of the law and the reasons why it finds non-compliance with the law. The interpretation of the agreement between the carrier and the union and of the I.C.C. order as to meaning consistent with law, is a matter which is to be left to arbitration according to the I.C.C. order as provided in Joint Exhibit 1 (pp. 7-8). *Arnold v. L. & N. R.R.*, 180 F. Supp. 429 (M.D. Tenn. 1960), *aff'd sub nom., Batts v. L. & N. R.R.*, 316 F.2d 22 (6th Cir. 1963).

Defendant will contend that Joint Exhibit 10 represents an agreement entered into pursuant to the last sentence of 49 U.S.C. § 5(2)(f) which reads:

> * * * Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Assuming that this does constitute an agreement, and assuming that it provides for protective benefits to be cal-

culated as the N & W claims that they are to be calculated, the Court is faced squarely with the question of whether such an agreement is to be enforced.

Numerous other courts have had opportunities to address themselves to this question: e.g., *O'Mara v. Erie Lackawanna R.R.*, 407 F.2d 647 (2nd Cir. 1969); *Flaherty v. Kansas, Oklahoma and Gulf R.R.*, 252 F. Supp. 736 (E.D. Okla. 1966); *Roberts v. Lehigh & New England R.R.*, 323 F.2d 219 (3rd Cir. 1963). The courts in these cases simply assumed that the agreement was in compliance with the statute and proceeded to consider whether this provision of the statute permitted the carrier and the union to change the I.C.C. order. In all of these cases it was held that it did. The ability to entirely rewrite the protective agreement does not necessarily imply the ability to lessen the Congressionally established minimum protection.

The court in *Arnold v. Louisville & Nashville R.R.*, 180 F. Supp. 429 (M.D. Tenn. 1960), *aff'd sub nom., Batts v. Louisville & Nashville R.R.*, 316 F.2d 22 (6th Cir. 1963), interpreted the provision of the statute in question as follows:

> Thus, while the statute requires the Commission to make provisions for the protection of employees adversely affected, it specifically reserves to the railroad employees the right, through their duly authorized representatives, to enter into an agreement with the railroad as to terms, conditions and arrangements for their own protection. Under this provision of the statute, as the Court construes its meaning and effect, the employees may, through a collective bargaining agreement with the railroad, make provisions for their own protection by *adopting, supplementing* or *implementing* the provisions made by the Commission for their protection. 180 F. Supp. at 433-34 (Emphasis added.)

This interpretation of the statute was adopted by the District Court in *Clemens v. Central R.R. of New Jersey*, 264

F. Supp. 551 (E.D. Pa. 1967), *rev'ed on other grounds*, 399 F.2d 825 (3rd Cir. 1968). This Court accepts this interpretation, that is that the agreement can alter, supplement, or vary the I.C.C. order so long as it does not abridge the protection afforded by the statute or the I.C.C. order.[6]

The language of the statute supports this interpretation. The first clause of the sentence reads "Notwithstanding any other provisions of this chapter * * *." This would seem to mean notwithstanding any provision of this chapter other than § 5(2)(f). As such it would seem to guarantee to the unions the rights to make agreements respecting protective benefits which might otherwise be construed to be solely a power of the I.C.C. Unfortunately the legislative history does not appear to shed any light on this question.

Finally, it must be realized that the economic policy underlying 49 U.S.C. § 5(2)(f) is very strong. A study of the history of this legislation in the House of Representatives reveals that adequate economic protection for those displaced in mergers was one of the main concerns of Congress in passing this legislation. To permit this policy to be undermined by agreements between the carriers and the unions would do violence to the Congressional scheme. The Court will hold that if the union and the N & W did reach the agreement which is embodied in Joint Exhibit 10, that agreement is unenforceable and void as against manifest public policy.

There has been talk of there being an accord and satisfaction which disposed of this case. The N & W has urged that there was an oral settlement of the claims coupled with Joint Exhibit 10 and several letters. This was reached by the N & W in negotiation with plaintiffs'

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[6] The Court realizes that an agreement may in changing the protective benefits lessen the protection as to certain classes of employees, without really altering the total level of protection. The courts should view such diminution of protective benefits with disfavor and such should only be permitted to stand if, when viewed in light of the entire scheme of protection as modified by the agreement in question, the diminution is benign.

union. What has been said with regard to Joint Exhibit 10 alone applies equally to any such agreement. Thus only an accord reached with each individual plaintiff may survive under the law. Defendant does not contend that there ever were such accords. This obviates the necessity of passing on whether any such agreement is in compliance with the statute of frauds or whether the statute of frauds applies.

Finally we come to the question of damages. This case could have been tried as a case for declaratory judgment pursuant to 28 U.S.C. § 2201. Even where declaratory relief is not requested the courts may grant such relief where the pleading and proof show such to be appropriate. *Katzenbach v. McClung,* 379 U.S. 294 (1964); *Hunkin-Conkey Const. Co. v. Pennsylvania Turnpike Commission,* 34 F. Supp. 26 (M.D. Penn. 1940). Once the Court has determined that the defendant's position is not in accord with the law or the I.C.C. order and that Joint Exhibit 10 is unenforceable, the case appears to be one of a grievance arising under the I.C.C. order and thus susceptible to the arbitration clause contained therein. *Arnold v. Louisville & Nashville R.R.,* 180 F. Supp. 429 (M.D. Tenn. 1960), *aff'd sub nom., Batts v. Louisville & Nashville R.R.,* 316 F.2d 22 (6th Cir. 1963). As such the Court will defer the exercise of its jurisdiction to the arbitration process. The question of whether the loss of wages of each individual plaintiff resulted from the loss of the ability to work throughout the Toledo Division or from furlough due to seasonal requirements or loss of volume of traffic or of revenue, is a question which is particularly amenable to arbitration. Therefore the Court will order that the parties arbitrate this question in compliance with the I.C.C. order.

The disposition of this portion of the case does not necessarily dispose of the third party complaint by the N & W against the Brotherhood of Railroad Trainmen. The parties should inform the Court before the 15th of January whether they desire to proceed with that portion of the cause.

Plaintiffs shall prepare an order in compliance with Rule 4(a) of the Rules of the United States District Court for the Northern District of Ohio.

/s/ DON J. YOUNG,
United States District Judge.

Toledo, Ohio.

FINAL JUDGMENT.

(Filed January 8, 1970.)

This cause came on to be heard upon defendant's motion for a summary judgment, plaintiffs' motion for a summary judgment, the stipulation of the parties, depositions, affidavits, and exhibits in support of said motions, and the briefs of counsel, and the Court, on consideration thereof, and for the reasons stated in its opinion heretofore filed, which constitutes its findings of fact and conclusions of law, finds that declaratory relief is appropriate in the premises; it is therefore

ORDERED that a declaratory judgment and order be rendered in favor of plaintiffs and against defendant, requiring that the parties submit to arbitration the question of the amount of damages to which the plaintiffs and each of them are entitled against the defendant, as required by the protective order of the Interstate Commerce Commission; and it is

FURTHER ORDERED that if the parties desire to proceed with the defendant's third party complaint against the Brotherhood of Railroad Trainmen, they shall so advise the Court prior to January 15th, 1970, but any proceedings on such third party complaint shall be deferred until the completion of the arbitration ordered herein.

THE COURT FURTHER FINDS that there is no just reason for delay and that the judgment herein entered shall constitute a final appealable order as to plaintiffs and defendant.

/s/ DON J. YOUNG,
United States District Judge.

Toledo, Ohio.

NOTICE OF APPEAL.

(Filed February 5, 1970.)

Notice is hereby given that the Norfolk and Western Railway Co., Defendant above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final judgment entered in this action on the 8th day of January, 1970 in favor of Plaintiffs and against Defendant, the Court having found no just reason for delay.

/s/ JOHN M. CURPHEY,
/s/ ROBISON, CURPHEY & O'CONNELL,
Attorneys for Defendant.

ORDER EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL.

(Filed March 16, 1970.)

Upon request of the Clerk of this Court; good cause therefore appearing

IT IS ORDERED that the time for the filing of the record on appeal in the United States Court of Appeals for the Sixth Circuit, and for the docketing therein is extended to March 30, 1970, pursuant to Rule 73 (g) of the Federal Rules of Civil Procedure, and Rule 11 (d) of United States Court of Appeals for the Sixth Circuit.

/s/ DON J. YOUNG,
United States District Judge.

Toledo, Ohio.

JOINT EXHIBIT 1.

Agreement for Protection of Employees, Effective January 10, 1962.

AGREEMENT FOR PROTECTION OF EMPLOYEES IN EVENT OF APPROVAL OF MERGER AND RELATED APPLICATIONS FILED BY NORFOLK AND WESTERN RAILWAY COMPANY AND OTHER CARRIERS IN I.C.C. FINANCE DOCKET NOS. 21510, 21511, 21512, 21513, AND 21514.

I. WHEREAS, a joint application has been filed with the Interstate Commerce Commission (herein called the Commission) in Finance Docket No. 21510 by the Norfolk and Western Railway Company (herein called Norfolk & Western) and the New York, Chicago and St. Louis Railroad Company (herein called Nickel Plate) under Section 5(2) of the Interstate Commerce Act (herein called the Act) for authority to merge the properties and franchises of Nickel Plate into Norfolk & Western, and for certain other authority incident thereto by way of acquisition of control of carriers subsidiary to or affiliated with Nickel Plate and to acquire certain trackage rights;

II. AND WHEREAS, Norfolk & Western has further filed an application with the Commission in Finance Docket No. 21511 under Section 5(2) of the Act for authority (a) to lease the lines of railroad and certain of the franchises and other properties of the Wabash Railroad Company (herein called Wabash); (b) to acquire control of Wabash through stock ownership; (c) to acquire sole or joint control of certain carriers subsidiary to or affiliated with Wabash through lease or stock ownership; and (d) to acquire trackage rights over or joint use of the railroad lines of certain carriers now held by Wabash;

III. AND WHEREAS, Norfolk & Western has further filed an application with the Commission in Finance Docket No. 21512 under Section 5(2) of the Act for authority (a) to purchase from The Connecting Railway Company (now operated by The Pennsylvania Railroad Company) its line of railroad between Columbus, Ohio

and Sandusky, Ohio, together with certain trackage in Columbus; and (b) to acquire trackage rights over certain lines of The Connecting Railway Company in Columbus, Ohio;

IV. AND WHEREAS, other applications have been filed by Norfolk & Western with the Commission under Section 20a of the Act for authority to issue capital stock and assume certain obligations and liabilities of both Nickel Plate and Wabash, all of which is more fully described in Finance Docket Nos. 21513 and 21514;

V. AND WHEREAS, certain other applications may be later filed with the Commission under Section 5(2) of the Act involving the lease, control by or merger into Norfolk & Western of The Akron, Canton & Youngstown Railroad Company and Pittsburgh & West Virginia Railway or transactions may be undertaken by the carriers heretofore named including Nickel Plate and Wabash involving the diversion of Wabash traffic from the Canadian National Railways to Nickel Plate, or the diversion of Nickel Plate passenger operations from the LaSalle Street Station (Rock Island Lines) in Chicago, Illinois, to the Chicago and Western Indiana Railroad (Dearborn Street Station), Chicago, Illinois, which applications or transactions may have adverse effects upon employees represented by the labor organizations parties hereto, the extent of which is not now determinable;

VI. AND WHEREAS, the international and national railway labor organizations signatory hereto are the authorized and recognized representatives of employees of Norfolk & Western, Nickel Plate, Wabash and other carriers involved in the said transactions, and have intervened (through the Railway Labor Executives' Association) in the above-described proceedings before the Commission on behalf of the said employees in opposition to the said merger and related transactions, which opposition is not waived by this Agreement;

VII. AND WHEREAS, Section 5(2)(f) of the Act (49 U.S.C.A. § 5(2)(f)) provides:

"As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

VIII. AND WHEREAS, pursuant to the provisions of the Railway Labor Act, as amended, and in accordance with the last sentence of Section 5(2)(f) of the Interstate Commerce Act above quoted, the parties signatory hereto have reached agreement respecting the protection to be afforded employees of the rail carriers involved in the aforesaid application and transactions.

NOW, THEREFORE, it is mutually agreed as follows:

Section 1.

(a) In the event the Commission should, notwithstanding the opposition of the said labor organizations to these transactions, approve any or all of the aforesaid applications, then, upon consummation thereof, the provisions of the Washington Job Protection Agreement of 1936

(a copy of which is attached hereto) will be applied for the protection of all employees of Norfolk & Western, Nickel Plate, Wabash and (except as hereafter modified in Section 3) all other carriers involved in each of the transactions designated or described in this Agreement, provided the applications or transactions mentioned therein are consummated, who may be adversely affected with respect to their compensation, rules, working conditions, fringe benefits or rights or privileges pertaining thereto, incident to approval and effectuation of any of said applications or transactions; provided, however, that in addition to the benefits set forth in the said Washington Job Protection Agreement, it is further agreed as follows:

(b) On the date the aforedescribed merger of Nickel Plate into Norfolk & Western is consummated, Norfolk & Western will take into its employment all employees of Nickel Plate as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated who are willing to accept such employment, and none of the present employees of either of the said carriers shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits, or rights and privileges pertaining thereto, at any time during such employment. For purposes of this Agreement the term "present employees" is defined to mean all employees except those on furlough or leave of absence as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated; provided, however, in the event two or more employees, including those on leave of absence, have employment rights to the same job, said employees will be protected hereunder and their employment preserved only to the extent of their individual equities in said job; provided, further, that the carrier shall also take over, assume and continue the employment relationship of all employees on furlough or leave of absence and preserve their rights and equities as they may exist as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is con-

summated subject, however, to the transfer of work and employees as hereinafter set forth. Norfolk & Western agrees to furnish rosters (which shall be attached as Appendix B to this Agreement) of all employees entitled to preservation of employment, compensation, and fringe benefits as of the effective date of this Agreement, together with their current rates of pay, compensation paid, and hours worked during the preceding twelve months, and also separate rosters (which shall be attached hereto as Appendix C) of all employees on furlough or leave of absence, each of which rosters shall also set forth the carrier by which the employees are employed and the labor organization party to this Agreement representing such employees. Norfolk & Western further agrees that the said rosters are subject to revision as necessary to include any employees to be added or deleted from the said rosters between the effective date of this Agreement and the date the merger is consummated. An employee shall not be regarded as deprived of employment or placed in a worse position with respect to his compensation in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements, failure to work due to disability or discipline in accordance with existing rules or agreements or furloughs because of reduction in forces due to seasonal requirements or decline in volume of traffic or revenues. Where employees are furloughed for seasonal requirements they shall not be furloughed in any twelve-month period for a greater period than they were furloughed during the twelve months preceding the date the merger is consummated.

In consideration of the foregoing employee benefits, Norfolk & Western and the other carriers heretofore named shall be entitled to transfer the work of the employees protected hereunder throughout the merged or consolidated system and the labor organizations will enter into implementing agreements providing for the transfer of employees to follow their work, and the employees, their organizations and the carriers will cooperate to that end. The implementing agreements to be negotiated with

respect to the transfer of employees shall enable the Norfolk & Western to transfer such employees without liability to furloughed employees who may be affected by such transfer. It is further agreed that implementing agreements will be negotiated to permit the assignment of employees who do not follow their work to other jobs within their craft or class in the same general locality as their point of employment on the date affected whether or not such jobs are within the same seniority district, without liability to furloughed employees who may be affected thereby. Where necessary, employees who do not follow their work will be retrained at carrier expense for other jobs within their craft or class and given a reasonable period in which to qualify therefor. In the event an employee after retraining does not qualify for any such job, he may be assigned to other work in his craft or class for which he is qualified.

(c) Norfolk & Western will take over and assume all contracts, schedules and agreements between Nickel Plate and the labor organizations signatory hereto concerning rates of pay, rules, working conditions and fringe benefits in effect at the time of consummation of the said merger, and will be bound by the terms and provisions thereof, subject to changes in accordance with the provisions of the Railway Labor Act, as amended, in the same manner and to the same extent as if Norfolk & Western had been a party thereto.

(d) For purposes of this Agreement, Section 13 of the Washington Job Protection Agreement is deleted and the following provision inserted in lieu thereof:

In the event any dispute or controversy arises between Norfolk & Western and any labor organization signatory to this Agreement with respect to the interpretation or application of any provision of this Agreement or of the Washington Job Protection Agreement (except as defined in Section 11 thereof) or of any implementing agreement entered into between Norfolk & Western and individual organizations which are parties hereto pertaining to the

said merger or related transactions, which cannot be settled by Norfolk & Western and the labor organization or organizations involved within thirty days after the dispute arises, such dispute may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within ten days, select one member of the arbitration committee and the two members thus chosen shall endeavor to select a third member who shall serve as chairman, in which event the compensation and expenses of the chairman shall be borne equally by the parties to the proceeding. All other expenses shall be borne by the party incurring them. Should the two members be unable to agree upon the appointment of the third member within ten days, either party may request the National Mediation Board to appoint the third member, whose compensation and expenses shall then be paid in accordance with existing law. The decision of the majority of the arbitration committee shall be final and binding.

Section 2.

It is further agreed that all of the provisions set forth in Section 1(a) of this Agreement respecting protection to be afforded employees in the event of merger of Nickel Plate into Norfolk & Western shall except as provided in Section 3 hereof apply and be afforded by Norfolk & Western to employees involved in each of the related transactions heretofore designated or described in this Agreement and, in addition, except as provided in Section 3 hereof the provisions of Section 1(b), (c) and (d) shall apply and be afforded by Norfolk & Western to employees of Wabash, The Akron, Canton & Youngstown Railroad Company and Pittsburgh and West Virginia Railway in the event said line or lines are leased to, controlled by or merged into Norfolk & Western with equal force and effect as if they had been repeated herein with specific reference to each such transaction.

Section 3.

On the effective date of the acquisition by Norfolk & Western of the Sandusky Line presently operated by the Pennsylvania Railroad, approval for which is sought in Finance Docket No. 21512, Norfolk & Western will take into its employment all employees represented by the labor organizations signatory hereto, except those on furlough or leave of absence as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated, who during such period have exercised employment rights on said Sandusky Line and elect to accept such employment; provided, however, that in the event two or more employees, including those on leave of absence, have employment rights to the same job, said employees will be protected hereunder and their employment preserved only to the extent of their individual equities in said job; and provided further, however, that none of such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment except that Norfolk & Western shall not be required to provide employment to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition. In the event any such employee elects not to accept such employment and in lieu thereof exercises employment rights on the Pennsylvania Railroad, Norfolk & Western agrees to offer employment to the employee of the Pennsylvania Railroad ultimately displaced by the return of said employee, who elects to accept such employment. Pennsylvania Railroad employees accepting such employment shall be entitled to all the protective benefits of this Section provided that Norfolk & Western shall not be required to provide employment or compensation to any such employee during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed

by and paid to the Sandusky Line employee, who caused such Pennsylvania Railroad employee to be displaced, in the twelve months' period immediately preceding the effective date of said acquisition.

Employees protected under this Section shall not be regarded as deprived of employment or placed in a worse position with respect to compensation in case of their resignation, death, retirement, dismissal for cause in accordance with existing agreements, failure to work due to disability or discipline in accordance with existing rules or agreements or furlough because of reduction in forces due to seasonal requirements as aforesaid or decline in volume of traffic or revenues.

On the effective date of said acquisition, Norfolk & Western will take over and assume all contracts, schedules and agreements having application on said Sandusky Line between Pennsylvania Railroad and the labor organizations signatory hereto concerning rates of pay, rules and working conditions, other than provisions therein (1) granting employees employed on said Line seniority or employment rights beyond said Line and (2) granting seniority or employment rights on said Line to employees having employment rights beyond said Line, in effect at the time of acquisition of said Sandusky Line and will be bound by the terms and provisions thereof subject to changes in accordance with the provisions of the Railway Labor Act, as amended, in the same manner and to the same extent as if Norfolk & Western had been a party thereto.

In the event the Commission approves the acquisition by the Norfolk & Western of trackage rights of 2.9 miles over certain lines of The Connecting Railway Company, now operated by The Pennsylvania Railroad Company, authority for which is sought as a part of Finance Docket No. 21512, then, upon consummation thereof, the provisions of the Washington Job Protection Agreement of 1936 will be applied for the protection of all employees of The Pennsylvania Railroad Company represented by the labor organizations parties hereto who may be adversely af-

fected as a result of such acquisition of trackage rights by Norfolk & Western with respect to their rates of pay, rules or working conditions or rights or privileges pertaining thereto.

It is further agreed that Section 1(d) herein shall be applicable to the provisions contained in this Section.

Section 4.

The foregoing represents an agreed settlement of protection of the interests of the employees of the carriers involved in the aforedescribed transactions as represented by their authorized and recognized bargaining representatives signatory hereto, pursuant to Section 5(2)(f) of the Interstate Commerce Act and applicable provisions of the Railway Labor Act, as amended, which shall become applicable only in the event of approval by the Commission and consummation of any or all of the above-designated applications now pending before it. It shall be considered and construed as a separate agreement between Norfolk & Western and each of the labor organizations signatory hereto.

Section 5.

It is understood and agreed that the provisions of this Agreement shall be for the benefit only of employees represented by the labor organizations parties hereto.

Section 6.

The effective date of this Agreement shall be January 10, 1962.

IN WITNESS WHEREOF, the parties to this Agreement have hereunto executed the same by and through their duly authorized representatives this 16th day of April 1962.

Norfolk & Western Railway Company
By /s/ Stuart T. Saunders
President

American Railway Supervisors Association
By /s/ J. P. Tahney

American Train Dispatchers' Association
By /s/ R. C. Coutts

Brotherhood of Maintenance of Way Employes
By /s/ H. C. Crotty

Brotherhood of Railroad Signalmen
By /s/ Jesse Clark

Brotherhood Railway Carmen of America
By /s/ A. J. Bernhardt

Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employes
By /s/ Geo. M. Harrison

Brotherhood of Sleeping Car Porters
By /s/ A. Philip Randolph

Hotel & Restaurant Employees & Bartenders International Union
By /s/ Richard W. Smith

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers
By /s/ Russel K. Berg

International Brotherhood of Electrical Workers
By /s/ Thos. Ramsey

International Brotherhood of Firemen & Oilers
By /s/ A. E. Matz

Railroad Yardmasters of America
By /s/ M. G. Schoch

Sheet Metal Workers' International Association
By /s/ J. W. O'Brien

The Order of Railroad Telegraphers
By /s/ G. E. Leighty

Brotherhood of Locomotive Engineers
By /s/ R. E. Davidson

Brotherhood of Locomotive Firemen & Enginemen
By /s/ H. E. Gilbert

Order of Railway Conductors & Brakemen
By /s/ Louis J. Wagner

Brotherhood of Railroad Trainmen
By /s/ W. P. Kennedy

International Association of Machinists
By /s/ J. W. Ramsey

Railway Employes' Department, AFL-CIO
By /s/ Michael Fox

JOINT EXHIBIT 2.

Memorandum of Understanding, Effective January 10, 1962.

In construing that certain Agreement for Protection of Employees in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514 effective January 10, 1962, between Norfolk and Western Railway Company and certain national and international labor organizations signatory thereto, it is understood and agreed as follows:

1. Norfolk and Western agrees that it will give advance notice of not less than that required by rules agreement with the organization or organizations involved to, and endeavor to confer with, the bargaining representatives of the employees involved regarding furloughs which

it intends to make pursuant to the aforesaid Agreement effective January 10, 1962.

2. The protection afforded by the aforesaid Agreement effective January 10, 1962, includes all Nickel Plate employees, represented by the labor organizations signatory thereto and employed on the date of said Agreement, who may be adversely affected by the construction or operation by Nickel Plate jointly in connection with the Erie-Lackawanna Railroad Company of yard properties and facilities in East Buffalo, New York, or by other transactions requiring ICC approval not designated in said Agreement.

3. If, subsequent to the date the protective benefits of the aforesaid Agreement effective January 10, 1962, become effective, officials, supervisory or excepted personnel exercise seniority rights in a craft or class of employees protected by said Agreement, then, during the period such seniority is exercised, such officials, supervisory or excepted personnel shall be entitled to the same protection afforded by said Agreement to employees in the craft or class in which such seniority is exercised, and no employee subject to said Agreement shall be deprived of employment or adversely affected with respect to compensation, rules, working conditions, fringe benefits, or rights and privileges pertaining thereto, by the return of the official, supervisory or excepted employee to work under the rules agreement.

4. It is understood and agreed that the said Agreement does not diminish the rights and benefits of the employees subject to the Agreement of June 18, 1959, or implementing agreements made pursuant thereto in the Norfolk and Western—Virginian merger case except that said Agreement effective January 10, 1962, shall apply with respect to arbitration, retraining of employees and transfer of work.

5. In construing the last paragraph of Section 1(b) of said Agreement concerning the right of the Norfolk &

Western to transfer the work of the employees protected under said Agreement, it is clearly understood and agreed that the Norfolk & Western may not transfer any employee (as distinguished from work) to another job within his craft or class beyond the same general locality as his point of employment on the date affected without the consent of his representative and that the refusal of such representative to agree to the transfer of such employee without the employee's consent shall not be subject to arbitration as provided in Section 1(d) of this Agreement.

Dated and made effective January 10, 1962.

Norfolk & Western Railway Company
By /s/ Stuart T. Saunders
President

American Railway Supervisors Association
By /s/ J. P. Tahney

American Train Dispatchers' Association
By /s/ R. C. Coutts

Brotherhood of Maintenance of Way Employees
By /s/ H. C. Crotty

Brotherhood of Railroad Signalmen
By /s/ Jesse Clark

Brotherhood Railway Carmen of America
By /s/ A. J. Bernhardt

Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees
By /s/ Geo. M. Harrison

Brotherhood of Sleeping Car Porters
By /s/ A. Philip Randolph

Hotel & Restaurant Employees & Bartenders International Union
By /s/ Richard W. Smith

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers
By /s/ Russel K. Berg

International Brotherhood of Electrical Workers
By /s/ Thos. Ramsey

International Brotherhood of Firemen & Oilers
By /s/ A. E. Matz

Railroad Yardmasters of America
By /s/ M. G. Schoch

Sheet Metal Workers' International Association
By/s/ J. W. O'Brien

The Order of Railroad Telegraphers
By /s/ G. E. Leighty

Brotherhood of Locomotive Engineers
By /s/ R. E. Davidson

Brotherhood of Locomotive Firemen & Enginemen
By /s/ H. E. Gilbert

Order of Railway Conductors & Brakemen
By /s/ Louis J. Wagner

Brotherhood of Railroad Trainmen
By /s/ W. P. Kennedy

International Association of Machinists
By /s/ J. W. Ramsey

Railway Employes' Department, AFL-CIO
By /s/ Michael Fox

JOINT EXHIBIT 3.

Memorandum of Understanding, Effective January 10, 1962.

In construing that certain Agreement for protection of employees in event of approval of the merger and related transactions filed by Norfolk and Western Railway Company and other carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514 effective January 10, 1962, between Norfolk and Western Railway Company and certain national and international labor organizations signatory thereto, it is understood and agreed as follows:

Said Agreement shall not be construed or used to prohibit or in any way limit the rights or obligations of the parties to modify or make changes in agreements affecting rates of pay, rules or working conditions to which the Norfolk and Western Railway Company or other carriers named therein are parties and which may be effectuated through concerted or national handling in the railroad industry.

Effective date January 10, 1962.

Norfolk & Western Railway Company
By /s/ Stuart T. Saunders
President

American Railway Supervisors Association
By /s/ J. P. Tahney

American Train Dispatchers' Association
By /s/ R. C. Coutts

Brotherhood of Maintenance of Way Employees
By /s/ H. C. Crotty

Brotherhood of Railroad Signalmen
By /s/ Jesse Clark

Brotherhood Railway Carmen of America
By /s/ A. J. Bernhardt

Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees
By /s/ Geo. M. Harrison

Brotherhood of Sleeping Car Porters
By /s/ A. Philip Randolph

Hotel & Restaurant Employees & Bartenders International Union
By /s/ Richard W. Smith

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers
By /s/ Russel K. Berg

International Brotherhood of Electrical Workers
By /s/ Thos. Ramsey

International Brotherhood of Firemen & Oilers
By /s/ A. E. Matz

Railroad Yardmasters of America
By /s/ M. G. Schoch

Sheet Metal Workers' International Association
By /s/ J. W. O'Brien

The Order of Railroad Telegraphers
By /s/ G. E. Leighty

Brotherhood of Locomotive Engineers
By /s/ R. E. Davidson

Brotherhood of Locomotive Firemen & Enginemen
By /s/ H. E. Gilbert

Order of Railway Conductors & Brakemen
By /s/ Louis J. Wagner

Brotherhood of Railroad Trainmen
By /s/ W. P. Kennedy

International Association of Machinists
By /s/ J. W. Ramsey

Railway Employes' Department, AFL-CIO
By /s/ Michael Fox

JOINT EXHIBIT 4.

Memorandum of Understanding, Effective January 10, 1962.

In construing that certain Agreement for Protection of Employes in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Company and other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514 effective January 10, 1962, between Norfolk and Western Railway Company and certain national and international labor organizations signatory thereto, it is understood and agreed between the parties signatory hereto as follows:

When it is determined an employe subject to the terms and conditions of said Agreement has been adversely affected because of such merger, the adjustments hereinafter referred to as a "displacement allowance" due him, if any, will be determined by the following formula:

1. The "average monthly compensation" shall be arrived at by taking the total compensation received by the affected employe for the last 12 months in which he performed service, beginning with the month immediately preceding the month in which it has been determined he was adversely affected (such 12 months being hereafter referred to as the "test period"), and then dividing by 12. If the said affected employe's compensation is less in any month because of the merger than the aforesaid "average monthly compensation," he shall be paid the difference less compensation for any time lost on account of absences

to the extent he is not available for service under the applicable Schedule rules. If the employe at any time receives compensation in a month equal to or more than the "average monthly compensation," he shall not be entitled to any adjustment.

NOTE—(a) It was understood and agreed that in determining the "average monthly compensation" provided for in this Section, that in any month in which an employe involved was on bona fide furlough for the entire month but performed emergency service to which he did not stand to be called under the rules of the working agreement applicable to the craft or class in which he held seniority, that such month would not be used as one of the months in such "test period."

(b) It was further agreed that any compensation whatsoever (including vacation pay, arbitraries, pay for time lost, etc.) received from the Railway Company, but excluding payments made on account of personal injuries when such payments are for reasons other than time lost, would be used to reduce the amount of displacement allowances due any employe.

2. After the "average monthly compensation" has been arrived at as set forth in Section 1 hereof, it will always remain an affected employe's "average monthly compensation" except that the percentage of future general wage increases will be added to the said "average monthly compensation" beginning with the date in the month in which such wage increase becomes effective.

EXAMPLE: If it has been determined that an employe's "average monthly compensation" is $500, and a general wage increase of two percent becomes effective, such increase will be added and this will produce a new "average monthly compensation" of $510. The new "average monthly compensation" will be used in calculating the adjustment to be made to employes adversely affected because of such merger on and after the effective date of such increase.

3. When it is determined that an employe is entitled to a displacement allowance under the provisions of this Agreement, it will be made on a monthly basis and same shall be paid as soon as practicable.

4. Claims for employes who contend they are adversely affected by the merger will be made by the individual employe to the officer designated by the Company, with a copy to the Local Chairman of his Organization, within 30 days after the end of each month in which he claims to have been adversely affected, on the form attached hereto and marked Exhibit "A." If the employe's claim is denied by the Company and he desires to appeal the decision, he will submit his claim to said Local Chairman for appropriate handling.

5. This Memorandum of Understanding is applicable to the employes represented by the organizations signatory hereto and supersedes all existing agreements which may be in conflict herewith.

6. This Memorandum of Understanding shall become effective January 10, 1962.

FOR THE NORFOLK AND WESTERN RAILWAY COMPANY:

/s/ Stuart T. Saunders
President

FOR THE EMPLOYES:

/s/ R. E. Davidson
Brotherhood of Locomotive Engineers

/s/ H. E. Gilbert
Brotherhood of Locomotive Firemen & Enginemen

/s/ W. P. Kennedy
Brotherhood of Railroad Trainmen

/s/ Louis J. Wagner
Order of Railway Conductors & Brakemen

JOINT EXHIBIT 5.

Stipulation and Agreement.

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket
Nos. 21510, 21511, 21512, 21513, and 21514.

STIPULATION AND AGREEMENT

It is hereby stipulated and agreed by the parties hereto, by and through their respective attorneys signatory hereto, that, should the Interstate Commerce Commission approve the pending applications in Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514, notwithstanding the opposition of the labor organizations signatory hereto, then in such event the provisions of the agreement (copy of which is attached hereto as Exhibit A) effective January 10, 1962, executed pursuant to the provisions of the Railway Labor Act, as amended, shall be applied for the protection of the interests of employees of the carriers involved in the above-entitled proceedings, as required by Section 5(2)(f) of the Interstate Commerce Act, and any report and order issued by the Commission in said proceedings approving the applications for merger and related transactions may so state.

Norfolk and Western Railway Company
By John P. Fishwick
Its Attorney

American Railway Supervisors Association
American Train Dispatchers' Association
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood Railway Carmen of America
Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employes
Brotherhood of Sleeping Car Porters
Hotel & Restaurant Employees & Bartenders International Union

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
Railroad Yardmasters of America
Sheet Metal Workers' International Association
The Order of Railroad Telegraphers
Brotherhood of Locomotive Engineers
Brotherhood of Locomotive Firemen & Enginemen
Order of Railway Conductors & Brakemen
Brotherhood of Railroad Trainmen
International Association of Machinists

By William G. Mahoney
Their Attorney

JOINT EXHIBIT 7.

Memorandum of Understanding.

(October 9, 1964.)

Norfolk and Western Railway Company will take over and operate, effective at 12:01 A.M., October 16, 1964, the Sandusky Line which was acquired in Interstate Commerce Commission Finance Docket No. 21512.

To provide for an orderly transition of eligible Pennsylvania Railroad employes who have elected to accept employment with the Norfolk and Western Railway Company, the following procedure will be used:

1. A list of eligible Pennsylvania Railroad employes who have elected to accept employment with the Norfolk and Western under the provisions of Section 3 of the "Agreement for Protection of Employees in Event of Approval of Merger and Related Applications filed by Norfolk and Western Railway Company and Other Carriers in I. C. C. Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514," dated January 10, 1962, will be estab-

lished. The names will appear on this list in the order of their seniority date on the Pennsylvania Railroad.

2. Supervisors of the Norfolk and Western will confer with interested Local Chairman and agree upon the number of men that will be needed to man the runs that will be established on the Norfolk and Western, as well as the number of men that will be initially needed to protect the extra lists that will be established at Columbus and Sandusky.

3. Employes who hold regular assignments immediately prior to the date of acquisition will remain on their runs as though the runs were under advertisement. On October 21, 1964, all runs on Sandusky District (including road and yard) will be bulletined. The advertisement bulletin will expire at 12:01 P.M., October 26, 1964, and assignments will be made prior to midnight same date.

4. After the assignments have been filled and the number of men agreed upon placed on the extra lists, additional men who are eligible and who have elected to accept employment with the Norfolk and Western will be called when needed to report for service with the Norfolk and Western in seniority order. Such men will have five days in which to report. Failure to report will result in forfeiture of their rights with the Norfolk and Western.

FOR THE NORFOLK AND WESTERN RAILWAY COMPANY

H. C. WYATT
Senior Vice President

FOR THE EMPLOYEES

J. F. MCNEEL
General Chairman, Brotherhood of Railroad Trainmen

J. J. COX
Brotherhood of Locomotive Engineers General Chairman

J. W. PRICE
General Chairman, Brotherhood of Locomotive Firemen and Enginemen

Oct. 9, 1964

JOINT EXHIBIT 8.

Implementing Agreement.

(October 27, 1964.)

WHEREAS, in Finance Docket No. 21512, the Interstate Commerce Commission, by report and order dated June 24, 1964, has approved and authorized the purchase by Norfolk and Western Railway Company of the Sandusky line of railroad and certain additional trackage of The Connecting Railway Company between Columbus and Sandusky, Ohio, and incidental to such purchase, the acquisition by Norfolk and Western Railway Company of trackage rights over a line of railroad of The Connecting Railway Company and trackage and joint use rights over the railroads of other carriers now held by The Connecting Railway Company and the Pennsylvania Railroad Company; and

WHEREAS, it is the desire of the parties signatory hereto to afford an orderly acquisition and operation of the Sandusky line by Norfolk and Western Railway Company effective 12:01 A. M., October 16, 1964:

NOW, THEREFORE, it is mutually agreed as follows:

1. Norfolk and Western Railway Company will take over and operate, effective at 12:01 A. M., October 16, 1964, the Sandusky line which was acquired in Interstate Commerce Commission Finance Docket No. 21512.

2. Norfolk and Western will take into its employment employees of the Pennsylvania Railroad who are eligible under the provisions of Section 3 of the "Agreement for Protection of Employees in Event of Approval of Merger And Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I. C. C. Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514," dated January 10, 1962, and who elect to accept such employment under the terms and provisions of Section 3 of that agreement, and which employees have been determined as those shown in Exhibit "A" attached hereto.

3. The Sandusky District of the Scioto Division will be established as a separate seniority district embracing

the territory from Hudson Street to and including Sandusky Yard.

4. A seniority roster of trainmen will be established initially of those who have elected to accept employment with the Norfolk and Western Railway Company under the terms and provisions of Section 3 of the agreement referred to above, and the names of those who have elected to accept employment with the Norfolk and Western will be placed on the roster in the order of their seniority dates on the Pennsylvania Railroad and they will have prior rights to service on Sandusky District. New employees taken into the service on Sandusky District after the effective date of this agreement will establish seniority on the Sandusky District as of the date they first perform service on that district.

5. The employees whose names appear in Exhibit "A," attached hereto, will work under the rates of pay, rules and working conditions applicable to those employees that were in effect immediately prior to the acquisition of Sandusky Line by Norfolk and Western Railway Company.

6. This agreement shall become effective at 12:01 A. M., October 16th, 1964, and shall remain in effect until changed or modified in accordance with the provisions of the Railway Labor Act as amended.

IN WITNESS WHEREOF, the parties to this Implementing Agreement have hereunto executed the same by and through their duly authorized representatives this 27th day of October, 1964.

FOR THE NORFOLK AND WESTERN RAILWAY COMPANY

H. C. WYATT

Senior Vice President

FOR THE EMPLOYEES

J. F. MCNEEL

General Chairman, Brotherhood of Railroad Trainmen

JOINT EXHIBIT 9.

Implementing Agreement No. 1-A (BLE-BLF&E-BRT—Sandusky Line).

Agreement between Norfolk and Western Railway Company and the employees thereof on the Sandusky District of the Scioto Division represented by Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Railroad Trainmen.

This Agreement is intended to implement the application of the Agreement for Protection of Employees, executed April 16, 1962, effective January 10, 1962, between the Norfolk and Western Railway Company and the national and international labor organizations representing employees of the carriers involved in the transactions which were the subject of Interstate Commerce Commission Finance Dockets Nos. 21510-21514, 21567, 21920, 22235 and 22236.

It is agreed:

1. (a) For the purposes of identification as "affected employees" of the carriers involved in the transaction which was the subject of I.C.C. Finance Docket 21512, the employees involved and covered hereby are those individuals formerly employed by the Pennsylvania Railroad who had elected to accept employment with the Norfolk and Western on the Sandusky District of the Scioto Division pursuant to Section 3 of the Agreement for Protection of Employees signed April 16, 1962, effective as of January 10, 1962, and who are hereby certified as adversely affected as of October 16, 1964.

(b) For the purposes of Section 1 of the Memorandum of Understanding effective January 10, 1962, relative to construing the above-mentioned Agreement for Protection of Employees, the "test period" for employees covered hereby shall be the period October 16, 1963—October 15, 1964, both dates inclusive. The "Average Monthly Compensation" for employees covered hereby shall be

arrived at by taking the total compensation received by the affected employee for service performed on the former Sandusky Line of Pennsylvania Railroad during the "test period" and dividing by 12; except that, if the affected employee comes within the category described in the second sentence of Section 3 of the above mentioned Agreement for Protection of Employees the total compensation received for service performed on the former Sandusky Line of Pennsylvania Railroad by the Sandusky Line employee who caused the affected employee to be displaced during the "test period" will be divided by 12 to determine the affected employee's "average monthly compensation."

(c) The foregoing does not relieve employees of handling and processing claims on and in accordance with Exhibit "A" to the above mentioned January 10, 1962, Memorandum of Understanding for payments allegedly due under the January 10, 1962, Agreement for Protection of Employees nor does it deprive the carrier of any defense against such claim which is available to the carrier under that Agreement.

2. In applying Section 1 of the above mentioned Memorandum of Understanding of January 10, 1962, in connection with the application of the January 10, 1962, Agreement for Protection of Employees when determining the "average monthly compensation" for employees who are organization representatives, it is understood that:

As to affected employees who were Local Chairmen, Grand Lodge officers, Grand Lodge representatives and delegates to labor organization conventions during the "test period," their "average monthly compensation" will first be arrived at as provided in Section 1 of the above-mentioned Memorandum of Understanding as particularized by Section 1(b) hereof. The "average monthly compensation" as thus determined will then be increased by the amount of 1.2 basic day's pay at the rate of service in which en-

gaged at the time the individual laid off for each date on which the individual lost time (or, in the case of an extra man, was laying off,) to participate in organization business, during the period of time he was employed on the former Sandusky Line of Pennsylvania Railroad during the "test period."

The dates, and rate of pay applicable to each, on which the individual lost time (or, in the case of an extra man, was laying off,) in order to participate in organization business will be certified by the individual involved and by an officer of his Grand Lodge and furnished to the designated officer of the Carrier.

3. In making adjustments as a result of "decline in volume of traffic or revenues," the following formula will be used to determine whether there has been a decline in volume of traffic or revenues and if a decline is found to have occurred, the amount of the reduction in the protective allowances which might otherwise be due the employees involved:

First: the total railway operating revenues (Line 3, Indexed Page 300, I.C.C. Report Form A) and the total revenue and non-revenue ton miles (Line 39, Indexed Page 508, I.C.C. Report Form A) of the railroads comprising the Norfolk and Western as of October 16, 1964, for each of the 12 calendar months, October 1963—September 1964, both inclusive, as reported to the Interstate Commerce Commission will be used as the base.

Second: the percentage of decline in (1) total railway operating revenues and (2) total revenue and non-revenue ton miles in any calendar month as compared to the base for the like calendar month during the period October 1963—September 1964, will each be determined.

Third: percentage of decline (1) and (2) will be totalled and that total divided by 2. The result of this calculation will be the "average percentage of decline."

Fourth: if the "average percentage of decline" as determined above is 1% or less for any calendar month, no reduction will be made. If the "average percentage of decline" is more than 1% for any calendar month, the protective allowance which might otherwise be due an employee for that calendar month shall be reduced by the "average percentage of decline" in excess of 1%.

Signed at Cleveland, Ohio, this ____ day of _____, 1965.

For the Employees:

For the Carrier:
H. C. Wyatt
Senior Vice President

General Chairman
Brotherhood of Locomotive Engineers

J. W. Price
General Chairman
Brotherhood of Locomotive Firemen and Enginemen

J. F. McNeel
General Chairman
Brotherhood of Railroad Trainmen

Approved:

Assistant Grand Chief Engineer
Brotherhood of Locomotive Engineers

C. Caldwell
Vice President
Brotherhood of Locomotive Firemen and Enginemen

J. M. King
Vice President
Brotherhood of Railroad Trainmen

JOINT EXHIBIT 10.

Letter, Oct. 25, 1965, H. C. Wyatt to J. F. McNeel.

NORFOLK AND WESTERN RAILWAY COMPANY

Cleveland, Ohio
October 25, 1965
166.18.15

Mr. J. F. McNeel, General Chairman
Brotherhood of Railroad Trainmen
Room 209, 683 East Broad Street
Columbus 13, Ohio

Dear Sir:

This has reference to the application of Section 3 of the Agreement effective January 10, 1962, for protection of employees in event of approval of merger and related applications filed by Norfolk and Western Railway Company and other Carriers, in I.C.C. Finance Dockets Nos. 21510, 21511, 21512, 21513, and 21514, to employees represented by your Committee who left the employ of the Pennsylvania Railroad Company and accepted employment with the Norfolk and Western Railway Company, effective as of October 16, 1964, the effective date of Norfolk and Western's acquisition of the "Sandusky Line."

Thus far we have not received information as to earnings of these employees on the Sandusky Line during the 12 months period immediately preceding the effective date of the acquisition. We are advised that it will be several months before this information can be made available to the Norfolk and Western.

We are in receipt of a statement of the total earnings during the 12 months prior to October 16, 1964 from employment on the Pennsylvania Railroad of each of the employees who left the employment of the Pennsylvania Railroad and accepted employment with the Norfolk and Western Railway Company October 16, 1964. Copy of that statement is enclosed herewith.

In order to start making protective allowances which may be due the employees involved under the January 10, 1962 Agreement, we are agreeable to setting up a temporary "average monthly compensation" for each such employee, which shall be 75% of the total compensation earned by such employee on the Pennsylvania Railroad during the period October 16, 1963 through October 15, 1964, divided by 12.

If such employee's compensation from the Norfolk and Western Railway Company is less in any calendar month because of the acquisition than the aforesaid temporary "average monthly compensation," he shall be paid a "displacement allowance" equal to the difference, less compensation for any time lost on account of absences to the extent he is not available for service under applicable agreement rules. All employees' temporary "average monthly compensation" shall be reduced by 15/31sts for the month of October, 1964.

When information as to compensation earned on the Sandusky Line during the 12 months immediately preceding the date of acquisition is available, any underpayments made for the period October 16, 1964 until the date the correct "average monthly compensation" figures are available will be adjusted and any overpayments made during that period will be withheld from the individual's current earnings or monthly displacement allowances, as the case may be, in installments of $20.00 each month until the total of his overpayment has been withheld.

Employees will have until December 31, 1965 to file claims on EX A Form 1, copy attached, for displacement allowances due for the period October 16, 1964 through November 30, 1965. Separate EX A Form 1 will be filed for each month for which a displacement allowance is claimed. Claims for displacement allowances which may be due for the month of December, 1965, and for any calendar month thereafter, must be made within 30 days following the end of the calendar month for which displacement allowance is claimed.

Where an employee has heretofore received a temporary advance, or advances, toward protective allowances which might be due him under the January 10, 1962 Agreement, the total amount of such temporary advances will be deducted from the amount he might be entitled to receive as temporary displacement allowances under the temporary arrangement provided for herein. In event an individual has already been advanced a sum in excess of the total amount he might now be entitled to receive as temporary displacement allowances under this arrangement, he will not be paid any temporary displacement allowance hereunder until such time as the total of the temporary displacement allowances he would be entitled to hereunder exceeds the amount of the temporary advance he has already received.

You understand that sums which individual employees may have received through the U. S. Railroad Retirement Board by way of unemployment benefits for periods during which they are paid displacement allowances by the Carrier must be withheld from the displacement allowances due the employee and remitted to that Board.

If the foregoing is acceptable to you, please so indicate in the space provided below.

Yours truly,
H. C. Wyatt
Senior Vice President

Accepted:
By J. M. McNeel
General Chairman, B. of R. T.
At Cleveland, Ohio
October 25, 1965

DEFENDANT'S EXHIBIT A.

Letter, April 23, 1962, H. C. Wyatt to F. C. Montgomery.

NORFOLK AND WESTERN RAILWAY COMPANY

Roanoke, Virginia

April 23, 1962

Mr. F. C. Montgomery, Vice President,
Brotherhood of Railway Trainmen,
1544 Standard Building,
Cleveland 13, Ohio.

Dear Mr. Montgomery:

This letter will confirm our discussions in Washington this date of proposed agreement for protection of employees in event of approval of merger and related applications filed by Norfolk and Western Railway Company and other carriers in ICC Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514. Vice President King of BRT and General Superintendent Noell of N&W joined us in this discussion.

In answer to your presentation of suggested changes in carrier proposals I replied that the agreement was already signed by practically all of the other rail brotherhoods and time did not permit a revision of this agreement, after which we discussed the meaning and interpretation of the signed agreement and your proposal. It was noted that you suggested no changes in Titles I, II, III, IV, V, VI, VII and VIII, Section 1(a).

Title VIII, Section 1(b):

In your suggested deletion of Section 1(b) of the signed agreement and substitution of other language, particularly in addition of spelling out protection accorded employees in case of economies undertaken by carrier because of the merger including, but not specifically limited to installation of centralized traffic control, mechanized maintenance of way work, modernization of equipment programs, abandonment or curtailment of existing facilities and shops, relocation of maintenance and repair work, changes in any existing work now performed on the

Norfolk and Western or Virginian pursuant to existing agreements, changes pursuant to any integration of employment forces, or other such economies or changes resulting from the merger, at any time during such employment, my reply was in meeting with committee of RLEA several months earlier, President Gilbert, who I understand was representing the operating brotherhoods, asked me the question "Is it my understanding that this agreement means and will be applied just as the so-called June 18, 1959, agreement covering your Virginian merger case is now being applied?" My reply to him and I stated to you that that is the meaning.

Title VIII, Section 1(c):

In discussing your proposed revision of the language of this section you pointed out that your primary concern was twofold. First, that we would be bound by the terms of all existing contracts, schedules, agreements and practices concerning rates of pay, rules, working conditions and fringe benefits of employees in effect at the time of consummation of such merger and will be bound by the terms and provisions thereof the same as if signatory or party thereto, subject to change in accordance with the Railway Labor Act, as amended. My reply here was the same as for Section 1(b), that this was our intention just as it has been applied in the Virginian merger case.

The second matter of concern was the recognition of the duly authorized and designated representatives of the employees in each bargaining unit of the merged line of railroad and our continuing the existing application of the said contracts, schedules, agreements and practices including a continuation of employees' representatives being able to hold conferences pertaining to disputes or on other matters at the customary places existing today. My reply was that we will maintain headquarters staffs, including personnel officer authorized to act, at both Cleveland and St. Louis.

Title VIII, Section 1(d):

You have suggested additional language to this section reading "It is fully understood that this agreement

to arbitrate disputes arising under this agreement or under the Washington Job Protection Agreement as provided above does not write out any provision of the existing contracts between the parties and any dispute relative thereto will be handled under the Railway Labor Act, as amended and will not be subject to this agreement." Mr. Noell and I replied to you that under the proposed agreement it is not our intention to take advantage of arbitration provisions in settling matters covered by the existing contracts on the individual properties.

Title VIII, Section 2:

You suggested eliminating from this section references to Section 3. I stated to you that the same understanding previously outlined will apply to employees of the Wabash, the Akron, Canton and Youngstown Railroad Company and the Pittsburgh and West Virginia Railway if and when said line or lines are leased to, controlled by or merged into the Norfolk and Western.

Title VIII, Section 3:

Repeating the fact that it is too late to change the proposed agreement, Mr. Noell and I outlined to you and Mr. King our intentions with respect to PRR employees of your representation involved in our purchase of the so-called Sandusky Line. This line between Columbus, Ohio and Sandusky, Ohio, will serve as the connecting link between the Norfolk and Western at Columbus and the Nickel Plate at Bellevue. It would be operated as a district of the Norfolk and Western's Scioto Division. This division now embodies separate freight seniority districts, namely the Kenova, Columbus and Cincinnati Districts. The new district would likewise be one of separate seniority. At a reasonable time prior to the effective date of the merger, PRR employees working on having seniority on the Sandusky Line would be given the election of severing their relationship with the PRR and establishing employment rights on the new Sandusky District or exercising their seniority on other districts of the PRR. The employees' position on the seniority roster of the new

Sandusky District would be in line with their seniority on the existing seniority district. The election by the individuals would be in order of their seniority, beginning with the senior.

The protection afforded these employees of the PRR would be in direct ratio to service on the district in the previous 12 months. This would apply not only to the employee who actually rendered that service, but also to a junior employee who may be displaced by reason of the senior employee electing to exercise his seniority on other districts of the PRR, but again limited to the service of the senior employee during the prior 12 months. It is also understood that a deadline or cut-off date will be set for the exercising of their election.

In answer to your question as to our agreeableness to take over and assume all contracts, schedules and agreements having application on said Sandusky Line between the Pennsylvania Railroad and your organization, my reply was affirmative.

Title VIII, Section 4:

You suggested additional language to this section reading as follows:

"The parties hereto are cognizant that the provisions of this Agreement must be implemented by appropriate additional agreements, and nothing herein will serve to bar the making of such implementing agreements by the Norfolk and Western and the designated representative of the affected employees. Any changes in seniority rights, working conditions, agreements, job assignments, operating rules, etc., contemplated or deemed necessary because of the merger will be held in abeyance until implementing agreements have been reached with the representatives of the affected employees covering their rights, privileges and protection."

You were told that we recognize the necessity of covering basic changes in employees' working conditions involved in this merger before such changes can be made effective. This was done prior to the merger with the Virginian and such a policy would be continued in this

merger transaction. It is further understood that in seeking such implementing agreements we will give the organization sufficient advance notice for their full and complete investigation and consideration.

Title VIII, Section 5:

No suggested change.

Title VIII, Section 6:

You raised the question as to the effective date of the agreement. This section of the agreement specifies that the effective date shall be January 10, 1962. In reply to your question as to the employees protected by this agreement, I replied to you that the protection covered employees as of the effective date of this agreement (January 10, 1962) or subsequent thereto up to and including the date the merger is consummated as outlined in Section 1(b).

In our discussion of Memorandum of Understanding lettered "A," you requested a more definite advance notice. My reply was that any major change in operations affecting employment required implementing agreements and as understood in our discussion of the agreement, this should afford protection for a situation causing you concern. I could not agree to grant a definite minimum period of advance notice.

You also expressed concern as to the arbitrary diversion of traffic without knowledge of the employees and in the absence of implementing agreement. Here again I stated that it was our purpose and intent to follow the same practice as in the case of the Virginian merger, where before traffic was diverted the various organizations were called in, the plan of diversion explained to them and implementing agreements drawn up to cover the situation.

You also asked if Paragraph 3 of this Memorandum of Understanding, which deals with the protective benefits of the agreement effective January 10, 1962, for officials, supervisory or excepted personnel exercising seniority rights in craft or class of employees protected by said agreement would likewise apply to a furloughed employee

serving as General Chairman or other office of your organization. My reply was that it would cover such an individual.

Under Paragraph 5 of this memorandum, dealing with the transfer of an employee, you asked if the terminology "general locality" would cover a situation where a yard man would be required to accept employment in another yard 300 miles away and in which he held no seniority. My reply was in the absence of an implementing agreement he could not be required to do so. You also asked if this yard man would be required to accept employment as a road brakeman on a division operating out of his yard. My reply was that assuming that this yard man's seniority was confined to the yard and he held no road seniority, then we could not require him to accept employment as a road brakeman, and in reply to your further question, I pointed out that it is fully understood that under this agreement an employee can not be required to accept employment outside his seniority district; however, in cases where we would have such an employee without work, we would urge him to accept employment in any of the seniority districts where vacancies existed and would ask for your cooperation in accomplishing this, but again with the full understanding he can not be forced to take such action short of an appropriate implementing agreement.

Under the Memorandum of Understanding lettered "B" you questioned the intention of Paragraph 1 and I pointed out that its language intended to make clear that the adversely affected was confined to the merger connection and the formula for determining payments to such an employee. You raised the question under Item 3 on the promptness of paying the displacement allowance. My reply was that investigation developed that while the payments initially were some several months late, under the existing procedure the payments are being made within 30 to 60 days. It is our expectation to make continued improvements and reasonably soon make all payments within 30 days.

Under 4 you questioned the 30-day limit for the filing of claims. It is my understanding that for the past four or five months this arrangement has proven satisfactory in the handling of claims arising from the N&W-Virginian merger. Under Item 4 you pointed out that your two General Chairmen who have been handling claims for N&W and former Virginian employees would much prefer to continue this practice, rather than have the individual employee submit his individual claim to the company, with a copy to the local chairman. My reply was that we would have no objection to such handling.

Yours very truly,

H. C. WYATT,
Vice President and
General Manager.

Cy: Mr. J. M. King, *Vice Pres.,*
Brotherhood Railway Trainmen.
Mr. W. A. Noell, *Gen. Supt.,*
Norfolk and Western Railway Co.

DEFENDANT'S EXHIBIT C.

Letter, July 13, 1965, J. F. McNeel to F. A. Johnson.

GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF RAILROAD TRAINMEN
Columbus, Ohio 43215
July 13, 1965

Mr. F. A. Johnson, Manager-Personnel
Norfolk & Western Railroad Company
2912 Terminal Tower Bldg.—P.O. Box 6119
Cleveland, Ohio 44101

Dear Sir:

On May 26, 1965, Secretary P. V. Hemmer and I discussed the Agreement known as Implementing Agreement No. 1-A on the Sandusky District, Scioto Division. This Agreement deals with the 'average monthly compensation' of the trainmen employes on this District.

We are very much concerned that such a long time has elapsed since the date of October 16, 1964, at which time all the employes who transferred to the N. & W. Railroad Company from the Pennsylvania Railroad Company were adversely effected.

We know that you have had difficulty in getting the earnings of these men for the period from October 16, 1963, to October 15, 1964, inclusive, from the Pennsylvania Railroad Company. However it is our understanding that you are now in possession of these earnings figures, but we still have not been able to get this Agreement signed.

While we appreciate the concession which you made orally wherein any employee who has suffered a loss of average monthly earnings while on the Sandusky District, could write to Mr. Scott, Superintendent at Portsmouth and request an adjustment in the guaranteed earnings each individual felt was now due him, it was our understanding that the men making this request should show a bona fide necessity for this adjustment.

While this has helped somewhat, we still feel you should, without further delay, arrange to complete the list of Certified Test Period Earnings that should accompany Implementing Agreement No. 1-A and arrange for this Agreement to be consummated.

Please give this matter your immediate attention and advise.

Yours very truly,
J. F. McNeel
General Chairman

cc:J.M.King,VP BRT
W.L.Butler,LC #844
H.I.Fearing,S-T "
C.R.Mick, LC #141
G.C.Gibson,Sec. "
PVH:HB

DEFENDANT'S EXHIBIT D.

Letter, July 27, 1965, Manager Personnel-Western Region to J. F. McNeel.

NORFOLK AND WESTERN RAILWAY COMPANY

At Cleveland, Ohio
July 27, 1965

Mr. J. F. McNeel, General Chairman
Brotherhood of Railroad Trainmen
Room 209, 683 E. Broad Street
Columbus, Ohio 43206

Dear Sir:

This is in reply to your letter of July 13, 1965, relative to earnings on Sandusky Line during the period October 16, 1963, to October 15, 1964, of those former employees of the Pennsylvania Railroad Company who elected to accept employment with the Norfolk and Western Railway Company on October 16, 1964.

As of this time, the information as to earnings necessary to implement Section 3 of the Agreement effective January 10, 1962, for Protection of Employees in event of approval of merger and related applications filed by the Norfolk and Western Railway Company and other carriers in I.C.C. Finance Dockets Nos. 21510, 21511, 21512, 21513, and 21514 has not been received by this company. While we have received some information, it is not adequate, and it would appear in the best interest of all concerned that when information as to Test Period Earnings is furnished, it be correct.

You will be advised further as soon as we are in a position to do so.

Yours truly,

Manager Personnel
Western Region

bcc: Mr. F. K. Day, Jr.
Mr. W. A. Noell

DEFENDANT'S EXHIBIT E.

Letter, October 8, 1965, J. F. McNeel to H. C. Wyatt.

GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF RAILROAD TRAINMEN

October 8, 1965

Mr. H. C. Wyatt
Senior Vice-President
Norfolk & Western Railway Company
Roanoke, Virginia

Dear Sir:

This has reference to Section 3 of the January 10, 1962 Agreement, entitled "Agreement for Protection of Employes in Event of Approval of Merger and Related Applications" filed by Norfolk and Western Railway Company in I.C.C. Finance Dockets Nos. 21510, 21511, 21512, 21513 and 21514.

Under this Section you are required to enter into an Agreement to implement the January 10, 1962 Agreement for protection of employes, which Agreement would clearly identify the employes adversely affected as a result of having elected to take employment with the Norfolk and Western Railway Company on October 16, 1964, the date said Company acquired the Sandusky Line of the Pennsylvania Railroad Company as outlined in I.C.C. Finance Docket No. 21512.

Accompanying this Implementing Agreement there must be a list of all adversely affected employes showing their Certified Test Period Earnings. It has been over eleven (11) months since the merger was consummated and, as of this date, in spite of every effort on our part, we have been unable to get the Norfolk and Western Railway Company to consummate the above referred to Implementing Agreement encompassing the certified Test Period Earnings List.

On April 9, 1965, Brotherhood of Railroad Trainmen Vice-President J. M. King accompanied by Secretary P. V. Hemmer of the Pennsylvania Railroad General Grievance

Committee-Lines West, representing the undersigned, and the Local Chairman of the Brotherhood of Railroad Trainmen Lodges 844 and 141 met with your representative, Mr. F. A. Johnson, Manager-Personnel, Western Region in Cleveland, Ohio on this matter.

At this time, Mr. Johnson presented an Implementing Agreement of this nature above referred to, which we agreed would be satisfactory, if a separate letter of understanding would be issued by you that would indicate Mr. A. F. Strack, a trainman who holds seniority on the Sandusky District of the Scioto Division, and is presently on leave of absence due to being a BRT Insurance Field Supervisor, would have the same certified test period earnings and protection features as the man who follows him on the present Sandusky District, Scioto Division, Norfolk and Western Railway Company Roster.

During our recent negotiations on the Columbus-Toledo Interdivisional runs starting in February, 1965 and terminating in May, 1965, we approached Mr. Johnson many times on this matter to no avail.

On July 13, 1965 I wrote Mr. Johnson again requesting that the Certified Test Period Earnings list be completed and the Implementing Agreement be consummated. On July 27, 1965 Mr. Johnson answered my letter stating:

> "As of this time, the information as to earnings necessary to implement Section 3 of the Agreement effective January 10, 1962, for Protection of Employees in event of approval of merger and related applications filed by the Norfolk and Western Railway Company and other carriers in I.C.C. Finance Dockets Nos. 21510, 21511, 21512, 21513 and 21514 has not been received by this company. While we have received some information, it is not adequate, and it would appear in the best interest of all concerned that when information as to Test Period Earnings is furnished, it be correct.
>
> You will be advised further as soon as we are in a position to do so."

On September 3, 1965 I wrote Mr. Johnson as follows:

"This refers to your letter of July 27, 1965, reading:

"This is in reply to your letter of July 13, 1965, relative to earnings on Sandusky Line during the period October 16, 1963, to October 15, 1964, of those former employees of the Pennsylvania Railroad Company who elected to accept employment with the Norfolk and Western Railway Company on October 16, 1964.

As of this time, the information as to earnings necessary to implement Section 3 of the Agreement effective January 10, 1962, for Protection of Employees in event of approval of merger and related applications filed by the Norfolk and Western Railway Company and other carriers in I.C.C. Finance Dockets Nos. 21510, 21511, 21512, 21513, and 21514 has not been received by this company. While we have received some information, it is not adequate, and it would appear in the best interest of all concerned that when information as to Test Period Earnings is furnished, it be correct.

You will be advised further as soon as we are in a position to do so."

I refer you to the language of my letter of July 13, 1965, reading in part as follows—"However it is our understanding that you are now in possession of these earnings figures, but we still have not been able to get this Agreement signed."

The above understanding was arrived at from your oral assertion to me on May 26, 1965, at Cleveland, Ohio witnessed by Secretary P. V. Hemmer and Local Chairman C. R. Mick, that you were now in possession of the earnings figures for the period October 16, 1963, to October 15, 1964, pertaining to the employes of the Sandusky Line while in the employ of The Pennsylvania Railroad Company who elected to take employment to the Norfolk and Western Railway Company on October 16, 1964, but

you thought they were too high and you felt further investigation was needed. We asked you at the time to give us the figures you had acquired with the thought that we might be able to explain them. This you declined to do, but requested more time to further investigate the matter.

As of July 13, 1965, we had no further word from you on this matter and reasoning that you now had had sufficient time to 'further investigate' the figures in your possession and requested that you arrange to complete this list of Certified Test Period Earnings that must accompany Implementing Agreement 1-A and arrange for this Agreement to be consummated.

Your reason for further delay, as specified in your letter of July 27, 1965, is just not satisfactory to me in view of our conversation on May 26, 1965.

This leaves me with the opinion that you have not complied with Section 3, of the January 10, 1962, Agreement and after almost ten months have elapsed since the Sandusky Lime Employees have been adversely affected, you apparently have no intention of complying with Section 3.

Therefore, you leave me with no alternative but to take the steps outlined in Section 1 (d) of the January 10, 1962 Agreement providing you do not arrange to consummate this Agreement within a reasonable time from receipt of this letter."

Since I have had no answer to this letter from Mr. Johnson, and reasoning that sufficient time has elapsed in which an Implementing Agreement encompassing the Certified Test Period Earnings should have been consummated, I have no alternative but to invoke Section 1 (d) of the January 10, 1962 Agreement.

As provided in Section 1(d) of the above mentioned Agreement, please select your Member of the Arbitration Committee within ten (10) days and advise the undersigned and the Brotherhood of Railroad Trainmen Member of the Arbitration Committee as to his name and address. Mr. J. M. King, Vice-

President, Brotherhood of Railroad Trainmen is designated as the BRT Member and should be addressed 807 Republic Building, Louisville, Kentucky.

Yours very truly,
J. F. McNEEL
General Chairman

cc: C. Luna, President
J. M. King, VP-BRT
Walter L. Butler, LC No. 844
H. I. Fearing, Sec. No. 844
C. R. Mick, LC No. 141
G. C. Gibson, Sec. No. 141
PVH: pm

DEFENDANT'S EXHIBIT F.

Letter, October 15, 1965, Senior Vice President to J. F. McNeel.

October 15, 1965.

Mr. J. F. McNeel, General Chairman
Brotherhood of Railroad Trainmen
Room 209
683 East Broad Street
Columbus, Ohio 43215

Dear Mr. McNeel:

This will acknowledge your letter of October 8, 1965, advising us, in effect, that you desire to proceed under Section 1 (d) of the merger agreement dated April 16, 1962, and effective January 10, 1962.

This is to advise that Mr. F. A. Johnson will represent our Company on the Arbitration Committee. Mr. Johnson will contact your Mr. J. M. King, at the address referred to in your said letter, in order to endeavor to select a third member of such Arbitration Committee who will serve as chairman.

You will note that I have sent Messrs. Johnson and King a copy of this letter.

Yours very truly,

Senior Vice President

cc:
Mr. F. A. Johnson, Manager Personnel
Norfolk and Western Railway Company
Mr. J. M. King, Vice President
Brotherhood of Railroad Trainmen

DEFENDANT'S EXHIBIT G.

Letter, October 19, 1965, Manager Personnel to J. M. King.

October 19, 1965
166.18.15

Mr. J. M. King
Vice President, B. of R. T.
807 Republic Building
Louisville, Kentucky

Dear Sir:

Please refer to Mr. J. F. McNeel's letter of October 8, 1965, addressed to Mr. H. C. Wyatt, Senior Vice President, and to Mr. Wyatt's letter of October 15, 1965, in response thereto; also our telephone conversation on October 18, 1965, in connection therewith, all regarding the application of Section 3 of the Agreement effective January 10, 1962 for protection of employees in event of approval of merger and related applications filed by Norfolk and Western Railway Company and other Carriers in ICC Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514.

As stated to you in our telephone conversation on October 18, 1965, I can meet with you in Room 2912, Terminal Tower Building, Cleveland, Ohio, on Monday, October 25, 1965, as soon as convenient after your arrival in Cleveland, (it is my understanding from our telephone conversation that you have commitments for the remainder of the week of October 18), for the purpose of selecting the third member of the Arbitration Committee, which Mr. McNeel, in his October 8th letter to Mr. Wyatt, asked be appointed.

It was also suggested to you during our telephone conversation that, in view of the fact the Norfolk and Western is and has at all times been willing to fulfill the obligation imposed upon it by Section 3 of the above mentioned January 10, 1962 Agreement, as soon as necessary earnings data could be obtained, we endeavor to arrive at a temporary arrangement on October 25, 1965, under

which some protective payments may be made to the employees involved pending receipt of necessary earnings data and under which any over or under payments which might be made pursuant to such temporary arrangement will be corrected when the earnings data is obtained.

Yours truly,

Manager Personnel

cc Mr. J. M. King
Vice President B. of R. T.
Route 1
Prattville, Alabama

bcc Mr. H. C. Wyatt

DEFENDANT'S EXHIBIT H.

Letter, October 25, 1965, F. A. Johnson to J. F. McNeel.

NORFOLK AND WESTERN RAILWAY COMPANY

Cleveland, Ohio
October 25, 1965

Mr. J. F. McNeel, G. C.
B. of R. T.
Room 209—683 E. Broad Street
Columbus 13, Ohio

Dear Sir:

During conference in Cleveland on April 9, 1965 in connection with the application of Section 3 of the January 10, 1962 Agreement for Protection of Employees, at which your organization was represented by Messrs. King, Hammer and Mick, the matter of determining an "average monthly compensation" for Mr. A. F. Strack, Jr., who was on leave-of-absence, serving as a Grand Lodge Representative, during the twelve months preceding the effective

date of the acquisition of the Sandusky Line by this Company was discussed.

We are willing to treat Mr. Strack as though he had earnings of $8,099.87 on the Sandusky Line during the twelve months October 16, 1963-October 15, 1964, both inclusive, for the purposes of determining an "average monthly compensation" figure for him in the event he should resume service as Trainman on the Sandusky District, provided your Committee will agree that such action will not be construed as an interpretation of Section 3 of the above-mentioned Agreement for Protection of Employees or considered as an example of a proper application of that agreement and will further agree that such action will not be referred to in connection with any other case.

If the foregoing is acceptable, please so indicate in the space provided below and return one signed copy of this letter to the undersigned.

Yours truly,
F. A. Johnson
Manager Personnel

Agreed to:
J. F. McNeel
G. C., B. of R. T.

DEFENDANT'S EXHIBIT I.

Letter, October 26, 1965, J. F. McNeel to H. C. Wyatt.

GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF RAILROAD TRAINMEN

October 26, 1965

Mr. H. C. Wyatt
Senior Vice-President
N & W Railway Company
Roanoke, Virginia

Dear Sir:

On Monday October 25, 1965 accompanied by Vice President J. M. King and Secretary P. V. Hemmer, I met with your representative, Mr. Frank Johnson, and Mr. Fred Young and an implementing agreement under Section 3 of the January 10, 1965 Agreement and two letters of understanding were signed.

Therefore, you may consider this letter as my Notice of withdrawal of my letter of October 8, 1965, as an Arbitration Board under Section 1 (d) of the January 10, 1962 Agreement is no longer necessary.

Yours very truly,
J. F. McNeel
General Chairman

cc: C. Luna, President, BRT
J. M. King, VP-BRT
W. L. Butler, LC No. 844
H. I. Fearing, Sec. No. 844
C. R. Mick, LC No. 141
G. C. Gibson, Sec. No. 141
Mr. Frank Johnson, Mgr.-Personnel N & W
PVH:pm

DEFENDANT'S EXHIBIT L.

Letter, April 11, 1966, J. F. McNeel to H. C. Wyatt.

GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF RAILROAD TRAINMEN

Room 209, 683 East Broad Street
Columbus, Ohio 43215

April 11, 1966

Mr. H. C. Wyatt
Senior Vice-President
N & W Railway Company
Roanoke, Virginia

Dear Sir:

This refers to your letter of April 7, 1966, referring to the conference in this office on March 31, 1966 at which you were represented by Mr. Fred Yancey, when the claims of various Sandusky District trainmen and conductors adversely affected by the merger under the provisions of Section 3 of the Agreement of January 10, 1962, were considered.

I have checked the attached list of amounts due thirty-nine (39) claimants and the figures on this sheet are correct. We will appreciate prompt payment of any amounts due and request this office and the Local Chairman be advised when these payments are made.

We want it clearly understood by all concerned that in final settlement of all these claims only the earnings made on the Sandusky District Scioto Division by the claimants should be used to offset their monthly guarantee, reasoning that only monies made on this territory were used to compile their guarantee. It just is not logical to restrict their protective guarantee earnings to monies earned in the twelve months prior to the merger on the Sandusky District only and then use monies made at Bellevue, Fostoria, N & W proper yard, Columbus, Ohio, other railroads and private industry.

As stated above, we are agreeable to accepting the amounts listed on the attached list, until this matter is

finally resolved as the claimants are in dire need of the money. We do anticipate further handling of this matter, as soon as prior commitments will allow. We will advise you of what steps we desire at some future date.

Your choice of Mr. Yancey to handle this matter is excellent, as he is well versed in the subject and certainly conducts himself in a manner which tends for amiable negotiations.

Yours very truly,
J. F. McNeel
General Chairman

cc: Mr. J. M. King, VP
Mr. C. R. Mick, LC No. 141
Mr. G. C. Gibson, Sec. No. 141
Mr. J. Fitz, LC No. 844
Mr. H. I. Fearing, Sec. No. 844
PVH:pm

DEFENDANT'S EXHIBIT P.

Letter, September 16, 1966, William E. B. Chase to J. E. Fitz with Attached Brotherhood of Railroad Trainmen Union Board of Appeals Decision in Case No. 3744.

BROTHERHOOD OF RAILROAD TRAINMEN

September 16, 1966

Mr. J. E. Fitz, LC 844,
815 Central Street,
Sandusky, Ohio 44871

Dear Sir and Brother:

Enclosed find decision of the Board of Appeals which is in connection with your appeal from the agreement dated October 25, 1965, for the protection of the employees represented by the Pennsylvania Railroad, Lines West, General Grievance Committee, who left the employ of

the Pennsylvania Railroad and accepted employment with the Norfolk and Western Railway Company effective as of October 16, 1964, the effective date of the latter's acquisition of the Sandusky Branch, Scioto Division.

With best wishes, I am

Fraternally yours,

WILLIAM E. B. CHASE
General Secretary and Treasurer.

cc: J. M. King, Vice President
J. F. McNeel, CGGC, Pennsylvania (W)
C. F. Dover, V. Chmn., GGC, Pennsylvania (W)
P. V. Hemmer, Sec'y., GGC, Pennsylvania (W)
R. C. Gibson, R&S 141
C. R. Mick, LC 141
H. I. Fearing, S&T 844

Case 3744—File 14646-B.

Appeal of J. E. Fitz, Local Chairman, Lodge 844, from the agreement dated October 25, 1965, for the protection of the employees represented by the Pennsylvania Railroad, Lines West, General Grievance Committee, who left the employ of the Pennsylvania Railroad and accepted employment with the Norfolk and Western Railway Company effective as of October 16, 1964, the effective date of the latter's acquisition of the Sandusky Branch, Scioto Division.

Under date of April 27, 1966, Local Chairman J. E. Fitz, Lodge 844, submitted the following letter of appeal to General Secretary and Treasurer W. E. B. Chase:

"We, the members of Lodge 844, are petitioning and praying for relief from the agreement of October 25, 1965, consummated between the Norfolk and Western Railway Company and the general chairman, Brother J. F. McNeel, concerning the protection and adversely affected payments to be allowed to the brothers employed on the Sandusky Branch Scioto Division, Norfolk and Western Railway.

We are also petitioning the Board of Appeals to submit this entire matter, arbitration in compliance with the I.C.C. Finance Dockets 21510 thru 21514.

"I am forwarding, with this appeal, a copy of this October 25, 1965, agreement (Exhibit A). As you can clearly see, the essence of this agreement to which we take exception, is as follows:

"1. This agreement allows 75% of compensation paid from October, 1963, until October, 1964, to trainmen employed on the Sandusky Branch.

"2. This agreement is a temporary agreement, only until such time as the earnings paid to these brothers on the Sandusky Branch, between October, 1963, and October, 1964, become available to the carrier.

"3. At such time as the carrier can obtain the earnings paid these brothers by the Pennsylvania Railroad, while in their employ, from October, 1963, until October, 1964, on the Sandusky Branch, they are then obligated to the carrier for payments of twenty (20) dollars per month for any overpayment made as a result of the Pennsylvania Railroad furnishing earnings, which the Norfolk and Western Railway will except as accurate.

"To more fully understand this situation, I will attempt to outline briefly the events leading up to this agreement. The Sandusky Branch, Scioto Division, came into being on October 16, 1964, as a result of the merger of the N&W, NKP, Wabash, ACY, PWV and the Sandusky Line (former Pennsylvania Railroad). The 96 trainmen, now employed on this division, were former employees of the Pennsylvania Railroad who held seniority on the Lake Region, Ft. Wayne Division, which encompassed Toledo, Columbus, Sandusky, Ohio, and Detroit, Michigan. As a result of this merger, this Pennsylvania Division was divided into two separate seniority districts, Toledo, Ohio, and Detroit, Michigan remaining in the Pennsylvania Railroad Ft. Wayne Division and Sandusky Yard

and the one hundred eleven (111) miles between Columbus and Sandusky forming the Sandusky Branch, Scioto Division, which was sold to the N&W Railroad as the connecting link between the N&W at Columbus and NKP at Bellevue, Ohio. At midnight, October 16, 1964, trainmen making the option to stay on the Sandusky Branch were terminated from the employ of the Pennsylvania Railroad and then became employees of the N&W, this taking place by authority of I.C.C. Finance Dockets 21510 thru 21514. The Finance Docket dealing expressly with the Sandusky line employees is numbered 21512 and specifically Section 3. It is Section 3 and the Memorandum of Understanding attached to these dockets we contend were violated in signing this temporary agreement.

"Bear in mind, these trainmen have always held seniority on the Ft. Wayne Division, Lake Region, while in the employ of the Pennsylvania Railroad and a considerable number of these brothers had most, if not all, of their earnings at Toledo, Ohio, in the years 1963 and 1964 while protecting their seniority at that point. The management of the N&W, however, contend they are only obligated to protect these men for monies earned performing service on the 111 miles of road between Columbus and Sandusky and the Sandusky yards, thereby dividing their earnings for the purpose of establishing a test period. They also contend they are only required to use earnings from October, 1963, until October, 1964. I have, to the best of my ability, dissected word for word Section 3 of Finance Docket 21512 (Exhibit B) and I fail to see what the carrier is using to support their position. Brother McNeel uses as support of his position a letter from Mr. H. C. Wyatt, Senior Vice President, N&W Railroad, addressed to Brother F. C. Montgomery, Vice President, Brotherhood of Railroad Trainmen, under date of April 23, 1962 (Exhibit C) which states on page 3, Title VIII, Section 3, second paragraph, '* * * The protection afforded these employees of the PRR would be in direct ratio to service on the district in the previous 12 months * * *' It is Brother McNeel's contention, because there

was no exception to this language, he was forced to except the N&W's position, holding only earnings paid these trainmen in the previous 12 months on the Sandusky Branch could be used in establishing a test period, this in a letter addressed to me under date of January 24, 1966 (Exhibit D).

"It is our position, whether through oversight or anything else, we fail to see why a letter signed by a vice president of the carrier has the authority to override an I.C.C. order or, for that matter, abrogate said order. We must further contend the 'Memorandum of Understanding' attached to and made a part of these Finance Dockets were utterly disregarded (Exhibit E). Here I will state our position in respect to the 'Memorandum of Understanding.'

"The 'Memorandum of Understanding,' attached to and made a part of the January 10, 1962, Agreement, (I.C.C. Finance Dockets 21510 thru 21514) (Exhibits B and E) is quite explicit in spelling out the method to be used in determining the test period.

"Under No. 1 of said understanding, it says, 'The average "monthly compensation" shall be arrived at by taking the total compensation received by the affected employe *for the last 12 months in which he performed service.*' These last ten words here italicized are, in my opinion, in their simplest form and meaning quite clear. It is our position this wording gives us the right to go back any length of time required to get 12 months service and nowhere can I find where this would restrict earnings for the test period to the previous 12 months, in this case October, 1963, to October, 1964. This language is identical to the language contained in the Washington Job Protection Agreement of 1936, Section 6, paragraph C.

"I will point out, also, in the heading of the memorandum it says, 'in construing that certain Agreement for protection of Employees in Event of Merger and related Applications filed by Norfolk and Western Railway Company and other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, *21512,* 21513 and 21514 effective January

10, 1962, between Norfolk and Western Railway Company and certain national and international organizations signatory thereto, it is understood and agreed between the parties signatory hereto as follows, etc.' By this wording we are not excluded or discriminated against, quite to the contrary, we are very definitely included, by the inclusion of Finance Docket No. *21512,* here italicized. It is, therefore, our contention Section 3 of Finance Docket 21512 cannot be applied in determining the test period. This is further guaranteed by Section 5 of 'Memorandum of Understanding' and again I quote, 'This Memorandum of Understanding is applicable to the employees represented by the organizations signatory hereto, and *supersedes all existing agreements* which may be in conflict herewith.' Our argument on this point is, the Memorandum of Understanding *supersedes all existing agreements,* and it is our contention it also supersedes Section 3 of the Finance Docket 21512 by virtue of the fact you can not have a Memorandum of Understanding before you have something that needs understanding, hence, Section 3 of Finance Docket 21512 came first and the Memorandum supersedes that.

"I have one more letter written by Brother F. C. Montgomery, Vice President, B. of R. T., to Mr. H. C. Wyatt, Vice President, N&W Railway, under date of February 23, 1966 (Exhibit F), written at my request and on our behalf wherein he again states our position in this matter. I am not yet in receipt of Mr. Wyatt's answer to this position; however, at such time as this becomes available to me, I will forward it to the Board and include it as material for this appeal.

"I am requesting a oral hearing be granted on this appeal in behalf of the brothers I represent of Cedar Point Lodge 844.

"I should like to take this opportunity to thank you, brothers, now, for all your efforts and consideration on this matter."

Exhibits marked A, B, C, D, E and F submitted with Brother Fitz' appeal are reproduced as follows:

EXHIBIT A

"NORFOLK AND WESTERN RAILWAY COMPANY

Cleveland, Ohio
October 25, 1965

"Mr. J. F. McNeel, General Chairman,
Brotherhood of Railroad Trainmen,
Room 209, 683 East Broad Street,
Columbus 13, Ohio

"Dear Sir:

"This has reference to the application of Section 3 of the Agreement effective January 10, 1962, for protection of employees in event of approval of merger and related applications filed by Norfolk and Western Railway Company and other Carriers, in I.C.C. Finance Dockets Nos. 21510, 21511, 21512, 21513 and 21514 to employees represented by your Committee who left the employ of the Pennsylvania Railroad Company and accepted employment with the Norfolk and Western Railway Company, effective as of October 16, 1964, the effective date of Norfolk and Western's acquisition of the 'Sandusky Line.'

"Thus far, we have not received information as to earnings of these employees on the Sandusky Line during the 12 months period immediately preceding the effective date of the acquisition. We are advised that it will be several months before this information can be made available to the Norfolk and Western.

"We are in receipt of a statement of the total earnings during the 12 months prior to October 16, 1964, for employment on the Pennsylvania Railroad of each of the employees who left the employment of the Pennsylvania Railroad and accepted employment with the Norfolk and Western Railway Company October 16, 1964. Copy of that statement is enclosed herewith.

"In order to start making protective allowances which may be due the employees involved under the January 10, 1962, Agreement, we are agreeable to setting up a temporary 'average monthly compensation' for each such employee, which shall be 75% of the total compensation earned by such employe on the Pennsylvania Railroad during the period October 16, 1963, through October 15, 1964, divided by 12.

"If such employe's compensation from the Norfolk and Western Railway Company is less in any calendar month because of the acquisition than the aforesaid temporary 'average monthly compensation,' he shall be paid a 'displacement allowance' equal to the difference, less compensation for any time lost on account of absences to the extent he is not available for service under applicable agreement rules. All employees' temporary 'average monthly compensation' shall be reduced by 15/31sts for the month of October, 1964.

"When information as to compensation earned on the Sandusky Line during the 12 months immediately preceding the date of acquisition is available, any underpayments made for the period October 16, 1964, until the date the correct 'average monthly compensation' figures are available will be adjusted and any overpayments made during that period will be withheld from the individual's current earnings or monthly displacement allowances, as the case may be, in installments of $20.00 each month until the total of his overpayment has been withheld.

"Employees will have until December 31, 1965, to file claims on EX A Form 1, copy attached, for displacement allowances due for the period October 16, 1964, through November 30, 1965. Separate EX A Form 1 will be filed for each month for which a displacement allowance is claimed. Claims for displacement allowances which may be due for the month of December, 1965, and for any calendar month thereafter, must be made within 30 days following the end of the calendar month for which displacement allowance is claimed.

"Where an employe has heretofore received a temporary advance, or advances, toward protective allowances which might be due him under the January 10, 1962, Agreement, the total amount of such temporary advances will be deducted from the amount he might be entitled to receive as temporary displacement allowances under the temporary arrangement provided for herein. In event an individual has already been advanced a sum in excess of the total amount he might now be entitled to receive as temporary displacement allowances under this arrangement, he will not be paid any temporary displacement allowance hereunder until such time as the total of the temporary displacement allowances he would be entitled to hereunder exceeds the amount of the temporary advance he has already received.

"You understand that sums which individual employees may have received through the U. S. Railroad Retirement Board by way of unemployment benefits for periods during which they are paid displacement allowances by the Carrier must be withheld from the displacement allowances due the employee and remitted to that Board.

"If the foregoing is acceptable to you, please so indicate in the space provided below.

Yours truly,
/s/ H. C. Wyatt
Senior Vice President

"Accepted:
/s/ J. M. McNeel
General Chairman, B. of R. T.
At Cleveland, Ohio
October 25, 1965."

EXHIBIT B

(Due to the length of Exhibit B, "Agreement for Protection of Employees in Event of Merger and Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514," the Agreement will not be reproduced here but will be placed in the file for the Board's ready reference.)

EXHIBIT C

"Norfolk and Western Railway Company
Roanoke, Virginia
April 23, 1962

"Mr. F. C. Montgomery, Vice President
Brotherhood of Railway Trainmen,
1544 Standard Building,
Cleveland 13, Ohio

"Dear Mr. Montgomery:

"This letter will confirm our discussions in Washington this date of proposed agreement for protection of employees in event of approval of merger and related applications filed by Norfolk and Western Railway Company and other carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514. Vice President King of BRT and General Superintendent Noell of N&W joined us in this discussion.

"In answer to your presentation of suggested changes in carrier proposals, I replied that the agreement was already signed by practically all of the other rail brotherhoods and time did not permit a revision of this agreement, after which we discussed the meaning and interpretation of the signed agreement and your proposal. It was noted that you suggested no changes in Titles I, II, III, IV, V, VI, VII and VIII, Section 1(a).

"Title VIII, Section 1(b):

"In your suggested deletion of Section 1(b) of the signed agreement and substitution of other language, particularly in addition of spelling out protection accorded employees in case of economies undertaken by carrier because of the merger including, but not specifically limited to installation of centralized traffic control, mechanized maintenance of way work, modernization of equipment programs, abandonment or curtailment of existing facilities and shops, relocation of maintenance and repair work, changes in any existing work now performed on the Norfolk and Western or Virginian pursuant to existing agreements, changes pursuant to any integration of employment forces, or other such economies or changes resulting from the merger, at any time during such employment, my reply was in meeting with the committee of RLEA several months earlier, President Gilbert, who I understand was representing the operating brotherhoods, asked me the question, 'Is it my understanding that this agreement means and will be applied just as the so-called June 18, 1959, Agreement covering your Virginian merger case is now being applied?' My reply to him and I stated to you that that is the meaning.

"Title VIII, Section 1(c):

"In discussing your proposed revision of the language of this section, you pointed out that your primary concern was twofold. First, that we would be bound by the terms of all existing contracts, schedules, agreements and practices concerning rates of pay, rules, working conditions and fringe benefits of employees in effect at the time of consummation of such merger and will be bound by the terms and provisions thereof the same as if signatory or party thereto, subject to change in accordance with the Railway Labor Act, as amended. My reply here was the same as for Section 1(b), that this was our intention just as it has been applied in the Virginian merger case.

"The second matter of concern was the recognition of the duly authorized and designated representatives of the

employees in each bargaining unit of the merged line of railroad and our continuing the existing application of the said contracts, schedules, agreements and practices including a continuation of employees' representatives being able to hold conferences pertaining to disputes or on other matters at the customary places existing today. My reply was that we will maintain headquarters staffs, including personnel officer authorized to act, at both Cleveland and St. Louis.

"Title VIII, Section 1(d):

"You have suggested additional language to this section reading, 'It is fully understood that this agreement to arbitrate disputes arising under this agreement or under the Washington Job Protection Agreement as provided above does not write out any provision of the existing contracts between the parties and any dispute relative thereto will be handled under the Railway Labor Act, as amended and will not be subject to this agreement.' Mr. Noell and I replied to you that under the proposed agreement, it is not our intention to take advantage of arbitration provisions in settling matters covered by the existing contracts on the individual properties.

"Title VIII, Section 2:

"You suggested eliminating from this section references to Section 3. I stated to you that the same understanding previously outlined will apply to employees of the Wabash, the Akron, Canton and Youngstown Railroad Company and the Pittsburgh and West Virginia Railway if and when said line or lines are leased to, controlled by or merged into the Norfolk and Western.

"Title VIII, Section 3:

"Repeating the fact that it is too late to change the proposed agreement, Mr. Noell and I outlined to you and Mr. King our intentions with respect to PRR employees of your representation involved in our purchase of the so-called Sandusky Line. This line between Columbus, Ohio, and Sandusky, Ohio, will serve as the connecting link between the Norfolk and Western at Columbus and the

Nickel Plate at Bellevue. It would be operated as a district of the Norfolk and Western's Scioto Division. This division now embodies separate freight seniority districts; namely, the Kenova, Columbus and Cincinnati Districts. The new district would likewise be one of separate seniority. At a reasonable time prior to the effective date of the merger, PRR employees working or having seniority on the Sandusky Line would be given the election of severing their relationship with the PRR and establishing employment rights on the new Sandusky District or exercising their seniority on other districts of the PRR. The employee's position on the seniority roster of the new Sandusky District would be in line with their seniority on the existing seniority district. The election by the individuals would be in order of their seniority, beginning with the senior.

"The protection afforded these employees of the PRR would be in direct ratio to service on the district in the *previous 12 months*. This would apply not only to the employe who actually rendered that service, but also to a junior employe who may be displaced by reason of the senior employe electing to exercise his seniority on other districts of the PRR, but again limited to the service of the senior employe during the prior 12 months. It is also understood that a deadline or cut-off date will be set for the exercising of their election.

"In answer to your question as to our agreeableness to take over and assume all contracts, schedules and agreements having application on said Sandusky Line between the Pennsylvania Railroad and your organization, my reply was affirmative.

"Title VIII, Section 4:

"You suggested additional language to this section reading as follows:

> 'The parties hereto are cognizant that the provisions of this Agreement must be implemented by appropriate additional agreements, and nothing herein will serve to bar the making of such implementing agreements by the Norfolk and Western and the des-

ignated representatives of the affected employees. Any changes in seniority rights, working conditions, agreements, job assignments, operating rules, etc., contemplated or deemed necessary because of the merger will be held in abeyance until implementing agreements have been reached with the representatives of the affected employees covering their rights, privileges and protection.'

"You were told that we recognize the necessity of covering basic changes in employees' working conditions involved in this merger before such changes can be made effective. This was done prior to the merger with the Virginian and such a policy would be continued in this merger transaction. It is further understood that, in seeking such implementing agreements, we will give the organization sufficient advance notice for their full and complete investigation and consideration.

"Title VIII, Section 5:

"No suggested change.

"Title VIII, Section 6:

"You raised the question as to the effective date of the agreement. This section of the agreement specifies that the effective date shall be January 10, 1962. In reply to your question as to the employees protected by this agreement, I replied to you that the protection covered employees as of the effective date of this agreement (January 10, 1962) or subsequent thereto up to and including the date the merger is consummated as outlined in Section 1(b).

"In our discussion of Memorandum of Understanding lettered 'A,' you requested a more definite advance notice. My reply was that any major change in operations affecting employment required implementing agreements and as understood in our discussion of the agreement, this should afford protection for a situation causing you concern. I could not agree to grant a definite minimum period of advance notice.

"You also expressed concern as to the arbitrary diversion of traffic without knowledge of the employees and in the absence of implementing agreement. Here again I stated that it was our purpose and intent to follow the same practice as in the case of the Virginian merger, where before traffic was diverted the various organizations were called in, the plan of diversion explained to them and implementing agreements drawn up to cover the situation.

"You also asked if Paragraph 3 of this Memorandum of Understanding, which deals with the protective benefits of the agreement effective January 10, 1962, for officials, supervisory or excepted personnel exercising seniority rights in craft or class of employees protected by said agreement would likewise apply to a furloughed employe serving as general chairman or other office of your organization. My reply was that it would cover such an individual.

"Under Paragraph 5 of this memorandum, dealing with the transfer of an employe, you asked if the terminology 'general locality' would cover a situation where a yard man would be required to accept employment in another yard 300 miles away and in which he held no seniority. My reply was in the absence of an implementing agreement he could not be required to do so. You also asked if this yard man would be required to accept employment as a road brakeman on a division operating out of his yard. My reply was that assuming that this yard man's seniority was confined to the yard and he held no road seniority, then we could not require him to accept employment as a road brakeman, and in reply to your further question, I pointed out that it is fully understood that under this agreement an employe can not be required to accept employment outside his seniority district; however, in cases where we would have such an employee without work, we would urge him to accept employment in any of the seniority districts where vacancies existed and would ask for your cooperation in accomplishing this, but again with the full understanding he can not be

forced to take such action short of an appropriate implementing agreement.

"Under the Memorandum of Understanding lettered 'B' you questioned the intention of Paragraph 1 and I pointed out that its language intended to make clear that the adversely affected was confined to the merger connection and the formula for determining payments to such an employe. You raised the question under Item 3 on the promptness of paying the displacement allowance. My reply was that investigation developed that while the payments initially were some several months late, under the existing procedure the payments are being made within 30 to 60 days. It is our expectation to make continued improvements and reasonably soon make all payments within 30 days.

"Under 4, you questioned the 30-day limit for the filing of claims. It is my understanding that for the past four or five months this arrangement has proven satisfactory in the handling of claims arising from the N&W-Virginian merger. Under Item 4, you pointed out that your two general chairmen who have been handling claims for N&W and former Virginian employees would much prefer to continue this practice, rather than have the individual employe submit his individual claim to the company, with a copy to the local chairman. My reply was that we would have no objection to such handling.

"Yours very truly,
/s/ H. C. Wyatt
Vice President and
General Manager.

"cc: Mr. J. M. King, Vice Pres.,
Brotherhood Railroad Trainmen.
Mr. W. A. Noell, Gen. Supt.,
Norfolk and Western Railway Co.

EXHIBIT D.

"Room 209, 683 East Broad Street
Columbus, Ohio 43215
January 24, 1966

"Mr. J. E. Fitz, Local Chairman,
Lodge 844

"Dear Sir and Brother:

"This refers to your letters of January 13, 1966, to President C. Luna and me concerning the Letter of Understanding under Section 3 of the January 10, 1962, Agreement for Protection of Employees as a result of the Sandusky Line being purchased from the P.R.R. Co. by the N. & W. Railway Company as outlined in I.C.C. Finance Docket 21512. This letter was signed effective October 25, 1965.

"In your one letter of January 13, 1966, you stated that you agreed to accept the conditions of the Letter of Understanding on a temporary basis. I find no fault with your reasoning on this point as the Letter of Understanding is in itself a temporary measure designed to give relief to the men on the Sandusky District Scioto Division of the N. & W. Railway Company who have been in need of financial aid but, due to the inability of the N. & W. Railway Company being unable to get the proper Sandusky Line earnings from the P.R.R. Company, have been unable to get any financial help.

"I am still of the opinion this Letter of Understanding will accomplish this purpose.

"In your second letter, you dwell on the language of an Agreement known as Implementing Agreement 1-A. You took exception to the fact that Paragraph B of this Agreement stipulates that the so-called 'test period' was arrived by taking the total earnings of the now Sandusky District men that were actually earned by them while employed on the Sandusky Branch of the P.R.R. Company in the twelve prior months to October 16, 1964, which I feel is proper under Section 3 of the January 10, 1962, Agreement. For support of my position, I have repeatedly

quoted the language of this section of the June 10, 1962, Agreement as well as the language of the Memorandum of Understanding attached to and made a part of the January 10, 1962, Agreement. For further support, there is a letter dated April 23, 1962, from Mr. H. C. Wyatt to Vice President F. C. Montgomery wherein Mr. Wyatt clearly spells out the test period will be arrived at as it was in our Agreement of October 25, 1965. Mr. Wyatt's language, unchallenged or refuted in any way, reads, "The protection afforded these employees of the P.R.R. would be in direct ratio to service on the district in the *previous* twelve months. This would apply not only to the employees who actually rendered that service but also to a junior employe who may be displaced by reason of the senior employe electing to exercise his seniority on the other districts of the P.R.R., but again limited to the service of the senior employe during the prior twelve months.'

"Therefore, in answer to both of your letters of January 13, 1966, I must again assert that my interpretation of Section 3 of the January 10, 1962, Agreement has been arrived at by long study and by advice from the men who handled this matter before I was required to come in contact with it.

"As far as your right to appeal, I believe President C. Luna answered you in his letter of January 18, 1966.

"Sorry I cannot agree with your position in this matter.

Fraternally yours,
/s/ J. F. McNeel
General Chairman."

EXHIBIT E.

"MEMORANDUM OF UNDERSTANDING

* * * * *

PRINTER'S NOTE:

The Memorandum referred to, dated January 10, 1962, is the same as Joint Exhibit 4, *supra,* p. 77, and is here omitted to avoid duplication.

EXHIBIT F.

"February 23, 1966

"Mr. H. C. Wyatt, Senior Vice President,
Norfolk and Western Railway,
Roanoke, Virginia

"Dear Sir:

"Please refer to your letter addressed to me under date of April 23, 1962, confirming our discussions in Washington, D. C., on that date, concerning the proposed agreement for protection of employees in event of approval of merger and related applications filed by the Norfolk and Western Railway Company and other carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514, and I would like to deal with a pertinent part of that letter found on page 3, which is identified as and titled VIII, Section 3.

"As you will recall, Vice President J. M. King accompanied me at this meeting and considerable time was spent in discussing the district from which the men who would cover the new Norfolk and Western Railway you propose to buy from the Pennsylvania Railroad, from Sandusky to Columbus, Ohio, which you advise will serve as the connecting link between the Norfolk and Western at Columbus and the Nickel Plate at Bellevue, Ohio.

"If my memory serves me correctly, you had a map of the proposed system on the wall of your private car and in discussion of the particular phase of your merger, I pointed out to you that the seniority district for these men encompassed Sandusky, Toledo and Columbus and advised, when we were talking, about how the men would make the transfer from Pennsylvania employment to N&W employment why it would be necessary to place bulletins at all three points so that the 50 senior men would have first opportunity for their job in seniority order on the Norfolk and Western.

"I am now advised that your representatives are holding that the area from Sandusky to Columbus comprises the seniority district, contrary to my understanding with you on April 23, 1962.

"I am told that the seniority district for the men who took employment with your merged railroad over the so-called Scioto Division held seniority on a common seniority roster on the Pennsylvania Railroad Toledo Division, Lake Region, and exercised seniority indiscriminately on the former Sandusky line of the Toledo Division, Toledo, Ohio-yard and road, Detroit-yard and Columbus-road, and in exercising their seniority their position on the seniority roster of this particular district was given full recognition.

"It was not my understanding, when we met in 1962, that these men would be deprived of any of the benefits contained in this protective agreement when adversely affected, but we now find that you are holding that employees from this common seniority board are being afforded protection in ratio to their earnings on the so-called Sandusky line.

"May I remind you of one point in our conversation where I advised you that it would be entirely possible that a man from Toledo who had not worked on the Sandusky line for years might, by reason of seniority, decide to assert that seniority and take employment with your company over this new Norfolk and Western Railroad and both Vice President King and I were assured these men would receive full consideration.

"It seems regrettable that an agreement which had the appearance of being one of the most outstanding merger agreements has now reached such a low point as to deprive men who could have stayed with the Pennsylvania but chose to take employment with your carrier are now being deprived of the benefits which I understood would be accruing to them in the event they asserted such prerogative.

"I will appreciate a reply from you outlining the position you now take.

"Very truly yours,

/s/ F. C. Montgomery, Vice President
Manager, Field Service Department."

Under date of May 3, 1966, Brother W. E. B. Chase addressed the following letter to General Chairman J. F. McNeel, Pennsylvania Railroad—Lines West, requesting the committee file and statement outlining the question at issue and its handling and the action taken thereon:

> "No doubt, by this time you have received your copy of a letter dated April 27, 1966, addressed to me by Brother J. E. Fitz, local chairman, Lodge 844, wherein he appeals to the Board of Appeals from the Agreement dated October 25, 1965, for the protection of employees represented by your general committee who left the employ of the Pennsylvania Railroad and accepted employment with the Norfolk and Western Railway Company effective as of October 16, 1964, the effective date of the latter's acquisition of the Sandusky Branch, Scioto Division.
>
> "Please forward me a statement in this matter on behalf of your general committee, outlining the question at issue and its handling, and the action taken thereon, as well as your committee file on the subject, furnishing all affected lodges with a copy."

On May 9, 1966, General Chairman J. F. McNeel, submitted the committee file and the following statement:

"This refers to your letter of May 3, 1966, concerning the appeal made by Brother J. E. Fitz, local chairman, Lodge 844, of the agreement of October 25, 1965, for the protection of employees represented by our general committee who left the employ of the Pennsylvania Railroad Company and accepted employment with the Norfolk and Western Railway Company, effective as of October 16, 1964, the effective date of the latter's acquisition of the Sandusky Branch, Scioto Division.

"There follows a statement outlining the question at issue and its handling as requested in your letter.

"The agreement referred to is apparently a Letter of Understanding signed by Mr. H. C. Wyatt, and me, on October 25, 1965, to afford temporary relief to certain trainmen on furlough status who had been unable to

acquire employment on the Sandusky District, Scioto Division. This letter is quoted below for your ready reference:

(The Letter of Understanding mentioned in General Chairman McNeel's letter is also Exhibit A in Local Chairman Fitz' letter of appeal and, inasmuch as it has already been quoted, it will not be repeated here.)

"In view of this, we will contain our statement and outline to the above quoted Letter of Understanding and the action leading up to its consummation.

"We have enclosed our file on this matter and when it has served its purpose, please return it to this office.

"In the file, you will find a copy of the so-called January 10, 1962, Agreement for protection of Employees.

"Your attention is directed to Section 3 of this Agreement which refers to the trainmen of the Sandusky District of the Scioto Division of the Norfolk and Western Railway Company and reads as follows:

'Section 3.

'On the effective date of the acquisition by Norfolk and Western of the Sandusky Line presently operated by the Pennsylvania Railroad, approval for which is sought in Finance Docket No. 21512, Norfolk and Western will take into its employment all employees represented by the labor organizations signatory hereto, except those on furlough or leave of absence as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated, who during such period have exercised employment rights on said Sandusky Line and elect to accept such employment; provided, however, that in the event two or more employees, including those on leave of absence, have employment rights to the same job, said employees will be protected hereunder and their employment preserved only to the extent of their individual equities in said job; and provided further, however, that none of

such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment except that Norfolk and Western shall not be required to provide employment to any such employe during any year, commencing on the effective date of said acquisition, of greater duration than such employe enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition. In the event any such employe elects not to accept such employment and in lieu thereof exercises employment rights on the Pennsylvania Railroad, Norfolk and Western agrees to offer employment to the employe of the Pennsylvania Railroad ultimately displaced by the return of said employe, who elects to accept such employment. Pennsylvania Railroad employees accepting such employment shall be entitled to all the protective benefits of this Section provided that Norfolk and Western shall not be required to provide employment or compensation to any such employe during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed by and paid to the Sandusky Line employe, who caused such Pennsylvania Railroad employe to be displaced, in the twelve months' period immediately preceding the effective date of said acquisition.

'Employees protected under this Section shall not be regarded as deprived of employment or placed in a worse position with respect to compensation in case of their resignation, death, retirement, dismissal for cause in accordance with existing agreements, failure to work due to disability or discipline in accordance with existing rules or agreements or furlough because of reduction in forces due to seasonal requirements as aforesaid or decline in volume of traffic or revenues.

'On the effective date of said acquisition, Norfolk and Western will take over and assume all contracts,

schedules and agreements having application on said Sandusky Line between Pennsylvania Railroad and the labor organizations signatory hereto concerning rates of pay, rules and working conditions, other than provisions therein (1) granting employees employed on said Line seniority or employments rights beyond said Line and (2) granting seniority or employments rights on said Line to employees having employment rights beyond said Line, in effect at the time of acquisition of said Sandusky Line and will be bound by the terms and provisions thereof subject to changes in accordance with the provisions of the Railway Labor Act, as amended, in the same manner and to the same extent as if Norfolk and Western had been a party thereto.

'In the event the Commission approves the acquisition by the Norfolk and Western of trackage rights of 2.9 miles over certain lines of the Connecting Railway Company, now operated by the Pennsylvania Railroad Company, authority for which is sought as a part of Finance Docket No. 21512, then, upon consummation thereof, the provisions of the Washington Job Protection Agreement of 1936 will be applied for the protection of all employees of the Pennsylvania Railroad Company represented by the labor organizations parties hereto who may be adversely affected as a result of such acquisition of trackage rights by Norfolk and Western with respect to their rates of pay, rules or working conditions or rights or privileges pertaining thereto.

'It is further agreed that Section 1(d) herein shall be applicable to the provisions contained in this Section.'

"From the language in this Agreement, it can be clearly adduced that the trainmen who formerly worked on the Pennsylvania Railroad and exercised their option to transfer to the Norfolk and Western Railway Company are entitled, for the purpose of determining the amount

of 'Certified Test Period Earnings,' only to the amount of monies earned on the Sandusky District during the twelve (12) months immediately preceding the effective date of the merger of the N&W-NKP-Wabash and the purchase of the Pennsylvania Railroad Sandusky Line which date was October 16, 1964.

"This can be further substantiated in a letter from Mr. H. C. Wyatt, Senior Vice President, Norfolk and Western Railway Company, to Brother F. C. Montgomery, Vice President, Brotherhood of Railroad Trainmen, dated April 23, 1962, which reads in part as follows: 'The protection afforded these employees of the Pennsylvania Railroad would be in direct ratio to the service on the district in the previous 12 months.'

"The next item in our file is a copy of a letter of Mr. W. A. Noell, Regional Manager, Norfolk and Western Railway Company addressed to All Engineers, Firemen and Trainmen on the Toledo Division and the Yard Conductors and Brakemen in the Sandusky, Toledo and Detroit Yards. In this letter, Mr. Noell outlines the initial operation of the trains programmed on the Sandusky District, Scioto Division, Norfolk and Western Railway Company and, in addition, Mr. Noell explained to all the affected men their right to transfer to the Norfolk and Western Railway Company and specified that they would be transferring under the provisions of Section 3 of the January 10, 1962, Agreement. On the bottom of this letter is a space to be detached and sent to Mr. Noell wherein the men who elected to transfer to the Norfolk and Western exercised this right and by their signatures agreed to transfer under Section 3 of the January 10, 1962, Agreement. Mr. Fitz, the appellant in this case, signed one of these form letters and therefore agreed to transfer to the Norfolk and Western under Section 3 of the January 10, 1962, Agreement.

"Next in the file on this matter is a Letter of Understanding signed October 9, 1964, by the general chairman of the Engineers, Firemen and Brotherhood of Railroad Trainmen which provides for the orderly transition of the eligible employees who had elected to transfer to the

Norfolk and Western Railway Company and again it is clearly spelled out that they have transferred under Section 3 of the January 10, 1962, Agreement. .

"On July 13, 1965, reasoning that more than a reasonable time had elapsed to enable the Norfolk and Western Railway Company to arrive at the proper figures to be used for the Sandusky trainmen under Section 3, we wrote to Mr. Frank Johnson, Manager-Personnel, Norfolk and Western Railway Company, who had, at that time been designated to handle this, urging him to complete the Test Period Earnings List without further delay. Mr. Johnson answered our letter advising us that the Norfolk and Western Railway Company still did not have the Sandusky Earnings separated and when the correct figures were available, he would advise us.

"Again, on September 3, 1965, having had no further word from Mr. Johnson on this subject, we again wrote to him and advised him that we had no alternative but to invoke Section 1(d) of the January 10, 1962, Agreement which reads as follows:

'Section 1(d).

'For purposes of this Agreement, Section 13 of the Washington Job Protection Agreement is deleted and the following provision inserted in lieu thereof:

"In the event any dispute or controversy arises between Norfolk and Western and any labor organization signatory to this Agreement with respect to the interpretation or application of any provision of this Agreement or of the Washington Job Protection Agreement (except as defined in Section 11 thereof) or of any implementing agreement entered into between Norfolk and Western and individual organizations which are parties hereto pertaining to the said merger or related transactions, which cannot be settled by Norfolk and Western and the labor organization or organizations involved within thirty days after the dispute arises, such dispute may be referred by either party to an arbitration committee for consideration and determination.

> Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within ten days, select one member of the arbitration committee and the two members thus chosen shall endeavor to select a third member who shall serve as chairman, in which event the compensation and expenses of the chairman shall be borne equally by the parties to the proceeding.
>
> "All other expenses shall be borne by the party incurring them. Should the two members be unable to agree upon the appointment of the third member within ten days, either party may request the National Mediation Board to appoint the third member, whose compensation and expenses shall then be paid in accordance with existing law. The decision of the majority of the arbitration committee shall be final and binding." '

"On October 5, 1965, with still no word from Mr. Johnson, we wrote to President C. Luna outlining our problem in this matter, advising him of our desire to invoke Section 1(d) and requesting that Brother J. M. King, Vice President, Brotherhood of Railroad Trainmen, be assigned as our member of the Arbitration Committee.

"In a letter dated October 7, 1965, President C. Luna agreed with our opinion and suggested the proper measures to take to bring this matter to Arbitration as provided in Section 1(d) above quoted.

"In a letter dated October 8, 1965, we wrote to Mr. H. C. Wyatt in compliance with Brother C. Luna's instructions. Mr. Wyatt, Senior Vice President, Norfolk and Western Railway Company answered our letter and notified us that Mr. Frank Johnson would be their member of the Arbitration Committee.

"Before this matter could be brought to arbitration, a conference was arranged in Mr. Johnson's office in Cleveland and Implementing Agreement 1-A was signed as well as the Letter of Understanding which is herein being appealed.

"Upon receipt of the Earnings Sheets furnished the Norfolk and Western Railway Company by the Pennsylvania Railroad Company, we compiled separate Earnings Sheets using 75% of each man's total earnings on the Pennsylvania Railroad Company in the twelve months prior to the effective date of the merger and purchase. All of this information was then furnished to the interested local chairmen and lodge secretaries with the explanation that this was only a temporary understanding and was made in order to help the Sandusky trainmen who were in immediate need of funds due to being on furlough status.

"We reasoned that the trainmen presently working on this district were generally earning in excess of their Certified Protection Earnings and were in no need of financial assistance.

"As a result of this conference and agreement, we withdrew our letter to invoke Section 1(d) by letter to Mr. Wyatt dated October 26, 1965.

"Brother J. E. Fitz wrote this office a letter dated January 13, 1966, expressing his opinion of the Letter of Understanding and accepting it on a temporary basis, retaining his right to appeal at some future date. This letter was addressed jointly to President C. Luna and the undersigned.

"On January 18, 1966, Brother Luna answered Brother Fitz.

"On January 24, 1966, we answered Brother Fitz and gave him our reasons for signing the Letter of Understanding.

"By letter dated January 31, 1966, Mr. Wyatt informed us that Mr. Fred Yancey has been assigned to this matter and that he would have Mr. Yancey meet with us in Columbus, Ohio, to consider the claims for Protective Allowance which had been submitted by the Sandusky District Trainmen under the terms of the Letter of Understanding of October 25, 1965.

"This meeting was held on March 31, 1966, at which time Local Chairman J. E. Fitz, Lodge 844, and Local Chairman C. R. Mick, Lodge 141, were present.

"At this meeting, we arrived at settlement of claims amounting to a total of $26,963.96.

"On April 7, 1966, Mr. Wyatt informed us that he was agreeable to paying these claims in accordance with the understanding of the Letter of October 25, 1965, and with the realization that this settlement would be without prejudice to our respective positions on these and other claims.

"We replied to Mr. Wyatt by letter dated April 11, 1966, and clearly set forth our position on these claims.

"Realizing that this matter is far from solved, we wrote Brother J. M. King this same date requesting that he meet with us to discuss this matter with the thought that such a meeting would be of great help in devising a method to pursue in order to arrive at a final fair settlement of this problem. Due to Brother King's other duties, this meeting has never been held.

"In summary, we see nothing in our actions which have not been handled in accordance with the provisions of the January 10, 1962, Agreement and feel that if the appeal of Brother Fitz is upheld, it will only further confuse the situation because a withdrawal on our part at this particular time would prevent the payment of the above mentioned $26,963.96 which we have agreed to accept.

"I trust the above statement is that sought by you in your letter of May 3, 1966."

Appearances

Brothers P. V. Hemmer, Secretary, General Grievance Committee, Pennsylvania Railroad, and J. E. Fitz, Local Chairman, Lodge 844, appeared before the Board and testified in connection with this appeal July 21, 1966.

Findings of the Board:

The records in connection with this case disclose that the Norfolk and Western Railway Company sent a letter via U. S. Mail to the conductors and trainmen holding seniority on the former Sandusky Branch of the Pennsylvania Railroad reading as follows:

"NORFOLK AND WESTERN RAILWAY COMPANY

Columbus, Ohio
September 30, 1964

"Engineers, Firemen, Conductors and Trainmen on Toledo Division—Yard Conductors and Yard Brakemen on Sandusky, Toledo and Detroit Yards.

"Effective October 16, 1964, or as soon thereafter as practicable, the Norfolk and Western Railway Company will purchase the Sandusky Line and proposes to establish the following runs on that line:

Two turnaround runs between Columbus and Bellevue, operating out of Columbus.

Two local runs operating between Columbus and Sandusky, making a one-way trip on alternate days.

One turnaround run between Sandusky and Bucyrus, operating out of Sandusky,

3 assigned yard runs and one relief at Sandusky.

Runs will be added or taken off as necessary to handle the business.

"To man the above runs, the Norfolk and Western Railway Company hereby offers to take into its employment employes of the Pennsylvania Railroad who are eligible under the terms and provisions of Section 3 of the 'Agreement for protection of employees in event of approval of merger and related applications filed by the Norfolk and Western Railway and other carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514.' dated January 10, 1962, and who elect to accept such employment under the terms and provisions of Section 3 of the above agreement.

"Election must be made on the form attached hereto and be mailed or delivered to Mr. W. A. Noell, Regional Manager, Western Region, Norfolk and Western Railway Company, in care of the office of the Superintendent Personnel, Pennsylvania Railroad, Union Station, Columbus, Ohio, on or before 12:01 a.m., October 16, 1964.

"Copy of Section 3 of the 'Agreement for Protection of Employees in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Com-

pany and Other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514.' dated January 10, 1962, and copy of brief outline of initial changes in operation on Sandusky Line, are attached for your information.

/s/ W. A. Noell
W. A. Noell
Regional Manager
Western Region
Norfolk and Western Railway Co.

(Detach this form on Dotted Line)

"Mr. W. A. Noell, Regional Manager, Western Region
Norfolk and Western Railway Company
c/o Office of the Superintendent Personnel
Pennsylvania Railroad
Union Station
Columbus, Ohio

"I, _____, elect to accept employment with the Norfolk and Western Railway Company under the terms and provisions of Section 3 of the 'Agreement for Protection of Employees in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514.' dated January 10, 1962.

"I, _____, decline the offer of employment by the Norfolk and Western Railway Company under the terms and provisions of Section 3 of the above agreement.

(Signed) _____
Date _____ (Title) _____
(Location) _____"

The so-called Sandusky Branch is a line of railroad extending from Sandusky in the north, southward to Columbus, Ohio, that was purchased by the Norfolk and Western Railway to form a physical link with their rail-

way proper and the newly merged property of the Nickel Plate Railroad.

Ninety six trainmen, formerly with the Pennsylvania Railroad, elected to accept employment on the N&W in accordance with the several agreements between the carrier and the Brotherhood, notably one agreement dated October 9, 1964, reproduced below:

"MEMORANDUM OF UNDERSTANDING

* * * * *

PRINTER'S NOTE:

The Memorandum referred to, dated October 9, 1964, is the same as Joint Exhibit 7, *supra*, p. 81, and is here omitted to avoid duplication.

A number of the trainmen who elected employment with the N&W while on furlough due to lack of work, were in dire need of funds and by way of finding some relief for these brothers, General Chairman J. F. McNeel took steps to invoke the arbitration feature of Section 1 (d) to force the carrier to take the necessary action to fulfill the requirements of Section 3 of the "Agreement for Protection of Employees in Event of Approval of Merger and Related Applications filed by Norfolk and Western Railway Company in I.C.C. Finance Dockets 21510, 21511, 21512, 21513 and 21514." which provides for test periods to determine the average monthly compensation of employees who transferred to the Norfolk and Western Railway Company who were adversely affected. Just before the question was to be handled in arbitration, the so-called agreement that is named in this appeal was consummated. It is self-explanatory and appears hereinbefore in this document as Exhibit A.

Oral argument was heard by the Board in Cleveland, Ohio, July 21, 1965. Shortly thereafter, the appellant submitted the following letter to the General Secretary and Treasurer:

"This letter is in reference to an appeal heard at Grand Lodge July 21, 1966, concerning the Agreement of October

25, 1965, covering adversely affected payments to the brothers of Lodges 141 and 844.

"There developed, in the process of the hearing, some information which I previously was unaware of; namely, that Implementing Agreement 1-A was signed and agreed to by the principals involved. This could have been unknown to me because of the transition in the office of local chairman, or to misunderstanding or negligence on my part. The reasons here are unimportant. The important thing is I know now this is an agreement and we are praying for relief from this agreement also because without this relief there can be no purpose or meaning to the entire appeal.

"I was laboring under the erroneous illusion the 'Letter of Understanding' was all that was agreed to between the parties and Implementing Agreement 1-A would not be signed until the breakdown of the so-called Sandusky Line earnings was available. The copy I have on file is a photostat (which I am furnishing) without date or signatures reproduced, also the heading implies it would be an agreement between all the operating Brotherhoods involved, this being one of the reasons I assumed it was not an agreement yet as the BLF&E representative at Sandusky is reasonably sure they are not a party to this agreement at this time. Further, Brother McNeel has made repeated reference to invoking Section 1 (d) of the January 10, 1962, Agreement, which also lead me to believe this was not yet an agreement.

"The brothers of Lodge 844 cannot accept this as a final and binding settlement as this agreement (1-A) is spiced with much reference to the 'Sandusky District' and the test period being 'October, 1963 to October, 1964' contrary to the Memorandum of Understanding, attached to and made a part of the January 10, 1962 (I.C.C. F. D. 21512) Agreement. We take particular exception to Section One (1), Paragraphs (a) and (b).

"This letter is meant as a clarification of my position but can in no way alter the facts, and was not meant to, as presented to the distinguished Board, in my oral arguments on July 21, 1966. However, in my original letter

requesting an appeal on April 27, 1966, I am of the opinion, by the wording embodied, you brothers could properly consider Implementing Agreement 1-A being appealed as well as the 'Letter of Understanding' and I will quote this wording for your ready reference:

> 'We, the members of Lodge 844, are petitioning and praying for relief from *the Agreement of October 24, 1965,* consummated between the N&W Railroad and the general chairman, Brother J. F. McNeel, concerning the protection and adversely affected payments to be allowed to the brothers employed on the Sandusky Branch, Scioto Division, Norfolk and Western Railroad. We are also petitioning the Board of Appeals to submit this entire matter to arbitration in compliance with I.C.C. Finance Dockets 21510 thru 21514.'

"If you find this issue could not be properly considered at this time, I would appreciate being apprised of the fact immediately in order that I may properly submit this matter to the Board of Appeals in compliance with Rule 13 of our Constitution.

> "Thank you in advance for your cooperation in this matter."

The following letter, in reply, is self-explanatory:

> "I am in receipt of your letter dated July 25, 1966, with enclosures, relative to your appeal to the Board of Appeals, from agreement of October 25, 1965, for protection of employees who left employment of PRR and accepted employment with the N&W effective October 16, 1965, which was considered in this headquarters July 21, 1966.
>
> "The additional information furnished is being referred to the Board of Appeals and I trust it will be given full consideration when that board releases its decision."

Among other things, the appellant contends the so-called agreement known as Exhibit A, while temporary, is a violation of the provisions of Section 3 of the I.C.C.

Finance Docket 21512. It is his position, although stated in very general terms, that a letter signed by a vice president of the carrier has no authority to override or abrogate an I.C.C. order. He further contends the Memorandum of Understanding attached to and made a part of the several I.C.C. dockets were utterly disregarded (see Exhibit E). He goes on further to say that Section 3 of Docket 21512 cannot be applied in determining the test period and that the Memorandum of Understanding of the same date as the aforementioned dockets supersedes all existing agreements (Exhibit E).

On the other hand, Brother P. V. Hemmer, Secretary, General Grievance Committee, in defending the agreement under appeal, points out that the need of the furloughed men for money was the motivating influence that caused Brother McNeel to try to persuade the carrier to give temporary help to these brothers pending final disposition of their monetary entitlements which final settlement, at that time, appeared to be subject to prolonged delay. It was the position of Brother Hemmer that the Letter of Understanding of October 25, 1966, between Brother McNeel and Mr. Wyatt, the senior vice president of the carrier, did no more than give an advance of 75% of the monies that were due them because the final total amount was, as yet, undetermined.

In the summary of General Chairman J. F. McNeel, he states there was nothing in his action which had not been handled in accordance with the January 10, 1962 Agreement.

The Board has carefully considered all the documentary evidence submitted to us for our study as well as the transcript of the oral testimony taken at the time of hearing and we are of the following opinion:

Many of the questions raised by the appellant in support of his position in the instant appeal are similar in nature to those used by the appellants in Board of Appeals Case No. 3705 released in August, 1965. In Case 3705, Brother Fitz was one of the appellants. In his submission in 3705, page 138, third paragraph, Brother Fitz brings up the question of lost protection money and he states

in part, "* * * and it is in this section (3) the trainmen of Lodge 844 lose their protection money, by disallowing wages paid these trainmen while protecting their seniority at Toledo, Ohio * * *."

In Case 3705, page 144, the Board said in reply, "The matter of protection money is of no moment in this case before us as this subject was disposed of in the agreement signed by the carrier and the Brotherhood chiefs effective January 10, 1962, and the accompanying Memorandum of Understanding in connection therewith of the same date."

We feel that the above effectively answers the latest contention of the appellant in this instant case concerning the method of arriving at the test period and the average monthly compensation as these very items are spelled out in the memorandum cited above.

Section 3 of title VIII of the "Agreement Effective January 10, 1962, and Attached Memoranda of Understanding For Protection of Employees in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Dockets Nos. 21510, 21511, 21512, 21513 and 21514," known as Exhibits "B" and "E," among other things, provides for employment or compensation to protected or adversely affected employees but with certain strings attached, to wit: "* * * Norfolk and Western shall not be required to provide employment or compensation to any such employe during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed by and paid for to the Sandusky Line employe * * *."

The correspondence known as Exhibit "D" is a letter appearing hereinbefore in this document and it definitely shows that the appellant was perfectly aware that there was a document known as Implementing Agreement 1-A previous to the appeal although he disclaims this knowledge until after he attended oral hearing in this case, yet the appellant submitted Exhibit "D" to the Board as a part of his appeal.

The files are replete with allusions to the protection afforded adversely affected employees, especially enlight-

ening is the correspondence on this and other matters between Vice President F. C. Montgomery for the Brotherhood and Senior Vice President H. C. Wyatt of the Norfolk and Western Railway and they are in agreement that the pattern for "test period" and "average monthly compensation" was set in Section 3 of the document known as Exhibits "B" and "E."

The appellant, in his appeal, makes the following plea: "We are also petitioning the Board of Appeals to submit this entire matter, (to) arbitration in compliance with I.C.C. Finance Dockets 21510 thru 21514."

This is a most peculiar request. The only thing we can make out of this is that this request is motivated by a desire to exhaust every avenue of appeal regardless of the validity of the contentions. Evidently, he has reference to Section 1 (d) of Exhibit "B," however, his interpretation of this section is open to question.

Section 1 (d) provides for arbitration only in the event the carrier or any of the signatory organizations are at odds or disagreement. In the instant case, there is no such disagreement between our Brotherhood and Norfolk and Western. The only disagreement we can see in this case is that of the appellant with the efforts of the representatives of the Brotherhood in their implementing and complementing the already existing guide lines established in Exhibits "B" and "E."

Still to be resolved is the propriety of the Letter of Understanding of October 25, 1965. If Section 3 of the January 10, 1962, Agreement is controlling in the instant case, and we believe it is, then there is nothing wrong with the Letter of Understanding. It does not conflict in any way with the controlling docket which spells out the protection features of adversely affected employees because the "Understanding" merely provides for monetary help for the distressed membership of up to 75% of their entitlement pending the certification and payment of the final figures in full settlement.

In the letter and attachments submitted to us after the oral hearings was concluded, we can find no fresh

evidence or argument that was not thoroughly explored during the hearing. We do note, as a final plea, the appellant requests relief from Implementing Agreement "1-A."

The Board finds no merit in this latest thesis of the appellant. We are convinced that no valid reasons have been put forth that would warrant the setting aside of either the Implementing Agreement "1-A" or the Letter of Understanding of October 25, 1965, under appeal.

We believe that General Chairman J. F. McNeel's actions in the instant case are right, proper and just and in conformity with the controlling I.C.C. Dockets that appear in Exhibits "B" and "E." Consequently, the appeal is denied.

DECISION:

Appeal Denied.

* * * * *

(Signatures Illegible.)

DEFENDANT'S EXHIBIT T.

Letter, March 3, 1967, Vice President-Personnel to J. F. McNeel.

Merger claims of various Sandusky District Conductors and Brakemen for the period October 16, 1964, through the month of September, 1966—

March 3, 1967

File: X-865-S-T

Mr. J. F. McNeel, General Chairman,
Brotherhood of Railroad Trainmen,
Room 209, 683 East Broad Street,
Columbus 13, Ohio.

Dear Sir:

Please refer to our conference on February 20, 1967, at which were also present Messrs. J. E. Fitz and C. R. Mick of your Committee, when the claims of various Sandusky District Conductors and Brakemen, allegedly ad-

versely affected by the merger for the period October 16, 1964, through the month of September, 1966, under the provisions of Section 3 of the Agreement of January 10, 1962, were reconsidered in the light of the adjusted "Test Periods" as agreed to.

We agreed to dispose of these claims as tabulated on Attachments "A," "B" and "C" herewith.

Attachment "A" covers the net amount due thirteen employes for the period October 16, 1964, through November, 1965, after deducting amount paid as tabulated in our letter of April 7, 1966.

Attachment "B" indicates the amount due twenty-six employes for the period October 16, 1964, through November, 1965, who did not receive any payment in the settlement of April 7, 1966.

Attachment "C" shows the adjusted amount of overpayment made to twenty-five employes on April 7, 1966, under letter agreement of October 25, 1965.

It was understood and agreed that all subsequent claims would be filed under existing agreements within thirty days following the end of the month involved.

The claims of Brakemen R. N. Nemitz and B. L. Hannah; also former employes H. E. Reeves and L. E. Billitter are being held in abeyance for further information and consideration.

Yours truly,

Vice President-Personnel.

B/C
WCS
HJB—This matter was discussed with representatives from your Department on date of conference. Several copies of attachment to our letter of April 7,
RCW 1966, as well as letter agreement dated October 25, 1965, (which among other things provide for a monthly deduction of $20.00 until total overpayment is withheld) are enclosed. Please arrange handling in line with understandings reached in conference on February 20, 1967. W. A. N.

DEFENDANT'S EXHIBIT U.

Letter, April 3, 1967, Vice President-Personnel to J. F. McNeel.

Merger claims of various Sandusky District Conductors and Brakemen for the period December, 1965, through September, 1966—

April 3, 1967
File: X-865-S-T

Mr. J. F. McNeel, General Chairman,
Brotherhood of Railroad Trainmen,
Room 209, 683 East Broad Street,
Columbus 13, Ohio.

Dear Sir:

Please again refer to our conference on February 20, 1967, at which were also present Messrs. J. E. Fitz and C. R. Mick of your Committee, when the claims of various Sandusky District Conductors and Brakemen, allegedly adversely affected by the merger for the period October 16, 1964, through the month of September, 1966, under the provisions of Section 3 of the Agreement of January 10, 1962, were reconsidered in the light of the adjusted "Test Period" as agreed to.

In our letter dated March 3, 1967, we disposed of the majority of these claims through the month of November, 1965.

I now attach statement showing additional amounts due thirty-one Sandusky District Conductors and Brakeman for the period December, 1965, through September, 1966.

Yours truly,

Vice President-Personnel.

B/C
EWN
HJB

RCW—Please arrange payment as soon as practicable, advising payroll period on which allowed.

W. A. N.

DEFENDANT'S EXHIBITS 1, 1A, AND 1B TO NOELL DEPOSITION.

Letter, September 30, 1964, W. A. Noell to Sandusky Line Employees and Attachments.

Noell Exhibit No. 1.

NORFOLK AND WESTERN RAILWAY COMPANY

Columbus, Ohio

September 30, 1964

Engineers, Firemen, Conductors and Trainmen on Toledo Division—

Yard Conductors and Yard Brakemen on Sandusky, Toledo and Detroit Yards—

Effective October 16, 1964, or as soon thereafter as practicable, the Norfolk and Western Railway Company will purchase the Sandusky Line and proposes to establish the following runs on that line:

Two turnaround runs between Columbus and Bellevue, operating out of Columbus.

Two Local runs operating between Columbus and Sandusky, making a one-way trip on alternate days.

On turnaround run between Sandusky and Bucyrus, operating out of Sandusky,

3 assigned yard runs and one relief at Sandusky.

Runs will be added or taken off as necessary to handle the business.

To man the above runs, the Norfolk and Western Railway Company hereby offers to take into its employment employees of the Pennsylvania Railroad who are eligible under the terms and provisions of Section 3 of the "Agreement for Protection of Employees in Event of Approval of Merger and Related Applications Filed by the Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514." dated January 10, 1962, and who elect to ac-

cept such employment under the terms and provisions of Section 3 of the above agreement.

Election must be made on the form attached hereto and be mailed or delivered to Mr. W. A. Noell, Regional Manager, Western Region, Norfolk and Western Railway Company, in care of the Office of the Superintendent Personnel, Pennsylvania Railroad, Union Station, Columbus, Ohio, on or before 12:01 AM, October 16, 1964.

Copy of Section 3 of the "Agreement for Protection of Employees in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514." dated January 10, 1962, and copy of brief outline of initial changes in operation on Sandusky Line, are attached for your information.

W. A. Noell
Regional Manager
Western Region
Norfolk and Western Railway Co.

(Detach this form on Dotted Line)

Mr. W. A. Noell, Regional Manager, Western Region
Norfolk and Western Railway Company
c/o Office of the Superintendent Personnel
Pennsylvania Railroad
Union Station
Columbus, Ohio

I, _____; elect to accept employment with the Norfolk and Western Railway Company under the terms and provisions of Section 3 of the "Agreement for Protection of Employees in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514." dated January 10, 1962.

I, _____, decline the offer of employment by the Norfolk and Western Railway Company under the terms and provisions of Section 3 of the above agreement.

(Signed) _____
(Title) _____

Date _____

Noell Exhibit 1A.

effective October 16, 1964, or as soon thereafter as practicable:

Norfolk and Western will purchase the Sandusky line, extending from Hudson Street, Columbus, Ohio, to Sandusky, Ohio, including the yard and coal piers at Sandusky, and will be granted trackage rights over two tracks between Hudson Street and a point a short distance east of the CA&C crossing at Columbus, and will purchase two tracks designated Nos. 73 and 74 in Pennor Yard, which will provide an eastward and westward main track for movement of N&W trains through these yards to and from the Sandusky line. In addition, tracks designated as Nos. 71 and 72 in Pennor Yard, will also be purchased by the Norfolk and Western. PRR will be granted trackage rights over the Sandusky line between Hudson Street and Carrothers. All of this trackage, including the line to Sandusky, will become a part of N&W's Scioto Division.

A modern traffic control system of signaling will be installed on tracks Nos. 73 and 74 through Pennor and Grogan yards and on to Bayside Yard at Sandusky, Ohio. The controls for the new signaling system will be placed in the dispatcher's office at Portsmouth, Ohio. Control of the signals and switches from the dispatcher's office will ultimately result in discontinuing some or all of the block stations on the Sandusky line.

Track on the Sandusky line will be upgraded for high speed operation. Connection will be installed at Bellevue, Ohio, between the Sandusky line and present Nickel Plate's W&LE District to permit train movements to and from Toledo, and between present Nickel Plate's line at

the east end of Bellevue yard and the Sandusky line to permit movement of trains between the yard and the Sandusky line. Connection will also be installed between the Sandusky line and present Nickel Plate's line at Sandusky to permit operation of trains between present Nickel Plate's Fremont-Fostoria line and the merged line's Sandusky (Bayside) yard, where trains from and to the Fremont-Fostoria line will be yarded and dispatched.

Operation of one westbound and two eastbound through freight trains will be established, to be manned by crews in turnaround service between Columbus and Bellevue. When the volume of traffic justifies, these runs will be extended to operate between Columbus and Toledo by utilizing present Nickel Plate trackage between Bellevue and Toledo. Coal trains will be operated from Columbus either to Toledo or to Sandusky, or in turnaround service between Columbus and points short of Toledo or Sandusky. All crews will set off or pick up at intermediate points, as directed.

Local freight service will be performed as required between Columbus and Sandusky.

Coal now moving via present NKP line to Huron, O., for dumping into vessels will be moved to Sandusky, O., for dumping along with other coal at that point. Coal moving from Brewster destined Sandusky for dumping into Lake vessels will be moved (1) by Toledo crews out of Brewster, who will set the cars off at Bellevue for picking up by Sandusky line crews, or for picking up by turn crews operating between Sandusky and points on the Sandusky line, or (2) by crews out of Brewster moving to Hartland, Huron, Bellevue or to Sandusky. When moving to either Sandusky or Toledo, Brewster crews will, when directed, pick up or set off cars at intermediate points on the going trip, as well as on the return trip.

N&W trains from and to the Sandusky line will be yarded and dispatched from any point within N&W's Columbus terminal.

It is contemplated that PRR yard crews at Columbus will continue to serve the industries just north of Hudson

Street now served by them and N&W yard crews will continue to serve the industries now served by N&W yard crews.

Noell Exhibit 1B.

FOR PROTECTION OF EMPLOYEES IN EVENT OF APPROVAL OF MERGER AND RELATED APPLICATIONS FILED BY NORFOLK AND WESTERN RAILWAY COMPANY AND OTHER CARRIERS IN I.C.C. FINANCE DOCKET NOS. 21510, 21511, 21512, 21513, and 21514

Section 3.

On the effective date of the acquisition by Norfolk & Western of the Sandusky Line presently operated by the Pennsylvania Railroad, approval for which is sought in Finance Docket No. 21512, Norfolk & Western will take into its employment all employees represented by the labor organizations signatory hereto, except those on furlough or leave of absence as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated, who during such period have exercised employment rights on said Sandusky Line and elect to accept such employment; provided, however, that in the event two or more employees, including those on leave of absence, have employment rights to the same job, said employees will be protected hereunder and their employment preserved only to the extent of their individual equities in said job; and provided further, however, that none of such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment except that Norfolk & Western shall not be required to provide employment to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition. In the event any such employee elects not to accept such employment and in lieu thereof exercises employment rights on the Pennsylvania Railroad,

Norfolk & Western agrees to offer employment to the employee of the Pennsylvania Railroad ultimately displaced by the return of said employee, who elects to accept such employment. Pennsylvania Railroad employees accepting such employment shall be entitled to all the protective benefits of this Section provided that Norfolk & Western shall not be required to provide employment or compensation to any such employee during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed by and paid to the Sandusky Line employee, who caused such Pennsylvania Railroad employee to be displaced, in the twelve months' period immediately preceding the effective date of said acquisition.

Employees protected under this Section shall not be regarded as deprived of employment or placed in a worse position with respect to compensation in case of their resignation, death, retirement, dismissal for cause in accordance with existing agreements, failure to work due to disability or discipline in accordance with existing rules or agreements or furlough because of reduction in forces due to seasonal requirements as aforesaid or decline in volume of traffic or revenues.

On the effective date of said acquisition, Norfolk & Western will take over and assume all contracts, schedules and agreements having application on said Sandusky Line between Pennsylvania Railroad and the labor organizations signatory hereto concerning rates of pay, rules and working conditions, other than provisions therein (1) granting employees employed on said Line seniority or employment rights beyond said Line and (2) granting seniority or employment rights on said Line to employees having employment rights beyond said Line, in effect at the time of acquisition of said Sandusky Line and will be bound by the terms and provisions thereof subject to changes in accordance with the provisions of the Railway Labor Act, as amended, in the same manner and to the same extent as if Norfolk & Western had been a party thereto.

In the event the Commission approves the acquisition by the Norfolk & Western of trackage rights of 2.9 miles over certain lines of The Connecting Railway Company, now operated by the Pennsylvania Railroad Company, authority for which is sought as a part of Finance Docket No. 21512, then, upon consummation thereof, the provisions of the Washington Job Protection Agreement of 1936 will be applied for the protection of all employees of The Pennsylvania Railroad Company represented by the labor organizations parties hereto who may be adversely affected as a result of such acquisition of trackage rights by Norfolk & Western with respect to their rates of pay, rules or working conditions or rights or privileges pertaining thereto.

It is further agreed that Section 1(d) herein shall be applicable to the provisions contained in this Section.

DEFENDANT'S EXHIBIT 2 TO NOELL DEPOSITION.

Letter, October 19, 1966, Vice President-Personnel to J. F. McNeel.

"Test Period" for Sandusky District Conductors and Brakemen—

October 19, 1966
File: X-865-S-T

Mr. J. F. McNeel, General Chairman,
Brotherhood of Railroad Trainmen,
683 East Broad Street,
Columbus, Ohio 43215.

Dear Sir:

Please refer to your letter of October 12, 1966, above subject:

You will find enclosed "Attachment No. 1" which shows the total amount of earnings as reported by the Pennsylvania Railroad in March, 1965, for the period twelve months prior to October 16, 1964, escalated by

seven percent for the period June 1, 1964, through October 15, 1964, and the "Test Period" amount for the forty-five Trainmen who were assigned exclusively to the Sandusky District during this twelve months period.

"Attachment No. 2" shows only the amount of earnings made by the balance of these employees while assigned out of Sandusky or Columbus, prorated on a calendar day basis as obtained from the crew assignment records on file in the Pennsylvania Railroad offices at Toledo, Ohio, a copy of which has already been furnished you. These figures and the resultant "Test Periods" also include the wage increase as calculated in "Attachment No. 1."

Please advise if these "Test Periods" as shown on the two attachments now meet with your approval.

Yours truly,

Vice President-Personnel.

B/C
HJBrinner.

DEFENDANT'S EXHIBIT 3 TO NOELL DEPOSITION.

Letter, October 25, 1966, J. F. McNeel to W. A. Noell.

GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF RAILROAD TRAINMEN

October 25, 1966

Mr. W. A. Noell
Vice-President—Personnel
Norfolk and Western Railway Company
Roanoke, Virginia 24011

Re: Test Period Earnings
Sandusky Conductors and Trainmen

Dear Sir:

This refers to your letter of October 19, 1966 on the above subject. We have checked both Attachments Nos. 1 and 2 against our figures and find them to be correct, with the following exceptions.

On Attachment No. 1—Mr. C. R. Mick should have the amount of $48.65 added to his total twelve (12) months test period earnings.

Mr. R. S. Shilling should have the amount of $121.43 added to his total twelve (12) months test period earnings.

On Attachment No. 2 Mr. W. L. Butler should have the amount of $97.30 added to his total twelve (12) months test period earnings.

Mr. Mick lost time in Brotherhood service on October 5, and 6, 1964 and is entitled to 1.2 x the local conductor's rate of $20.27.

Mr. Butler, former Local Chairman, lost time in Brotherhood work on the dates of June 9 and 10, September 24 and October 6, 1964, a total of four (4) days or 1.2 x $20.27 x 4.

Mr. Shilling, former Local Chairman at Columbus, lost time in Brotherhood work on the following dates. June 10, 1964, September 9, 10, 23, 24, 1964 a total of five (5) days x $19.84 x 1.2.

Please consider this as certification of the time lost by the trainmen in accordance with Implementing Agreement 1-A, Section 2, dated October 25, 1965.

On Attachment No. 2 you have given Mr. A. F. Strack, Jr.—a lesser amount than was agreed upon for him in a letter dated October 25, 1965, signed by Mr. Frank Johnson and me, a copy of which is attached.

On Attachment No. 1—we are still of the opinion that Mr. Wake and Mr. Robinson should have that portion of their injury settlements, which was considered lost time, added to their twelve (12) months total protective earnings.

If you are willing to add the earnings for time lost in Brotherhood service for the Local Chairmen listed above and abide by the Letter of Understanding concerning Mr. Strack, we are willing to accept the figures in your letter of October 19, 1966 as final, with the exception of the figures for Mr. Robinson and Mr. Wake.

We would like to further discuss these two men's protective earnings figures.

Yours very truly,
J. F. McNeel
General Chairman

cc: J. M. King, VP-BRT
C. R. Mick, LC No. 141
G. C. Gibson, Sec. No. 141
J. E. Fitz, LC No. 844
H. I. Fearing, Sec. No. 844
PVH:pm

DEFENDANT'S EXHIBIT 4 TO NOELL DEPOSITION.

Letter, March 26, 1966, H. C. Wyatt to F. C. Montgomery.

March 26, 1966.

Mr. F. C. Montgomery, Vice President
Manager, Field Service Department
Brotherhood of Railroad Trainmen
Cleveland, Ohio 44113

Dear Mr. Montgomery:

Referring to your letter February 23, 1966.

During our discussions in Washington, D.C., on April 23, 1962, and as confirmed in the second paragraph, page 3, of my letter to you that date, I stated that my understanding of Section 3 of the "Agreement for Protection of Employees in Event of Approval of Merger and Related Applications Filed by the Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514." dated January 10, 1962, was that the protection afforded employees of the PRR who elected to sever their employee relationship with the PRR and accept employment with

the N&W, would be in direct ratio to their service on the Sandusky Line in the previous 12 months. I further stated that this would apply not only to the employee who actually rendered that service, but also to a junior employee who may be displaced by reason of the senior employee electing to exercise his seniority on other districts of the PRR, but again limited to the service of the senior employee on the Sandusky Line during the prior 12 months.

The protection afforded under the provisions of Section 3 of the agreement was thoroughly explained to the various Organizations' representatives during a series of conferences just prior to the effective date of the merger, and the offer of employment with the N&W was made to the eligible PRR employees under the terms and provisions of Section 3, a copy of which was furnished each eligible PRR employee.

There has been no change in our understanding of the protection afforded by the agreement, and we trust that this explanation will help clarify our position in the matter.

Yours very truly,
H. C. Wyatt
Senior Vice President

B/C
WAN

BRIEF OF AMICUS CURIAE SUBMITTED TO DISTRICT COURT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

CIVIL ACTION No. 37346.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IRA CLEMENS,

Plaintiff,

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, LEHIGH AND NEW ENGLAND RAILWAY COMPANY, and LEHIGH AND NEW ENGLAND RAILROAD COMPANY,

Defendants.

BRIEF OF THE INTERSTATE COMMERCE COMMISSION AMICUS CURIAE.

ROBERT W. GINNANE
General Counsel

LEONARD S. GOODMAN
Assistant General Counsel
Interstate Commerce Commission
Washington, D. C. 20423

Attorneys for the Interstate Commerce Commission

February 1966

* * * * *

(Caption repeated.)

STATEMENT.

This suit purports to arise under Section 5(8) of the Interstate Commerce Act, 49 U.S.C. 5(8), and 28 U.S.C. 1336, as an action to enforce the order of the Commission in *Lehigh & New England R. Co. Abandonment*, 312 I.C.C. 645 (1961), to the extent the Commission therein

protected employees from financial injury resulting from the approved transaction. By letter of January 6, 1966, this Court requested the Commission to appear amicus curiae to state its position on the issues in the above-entitled proceeding. While initially calling the Commission's attention to certain areas of dispute, the Court in its further letter of January 17, 1966, to the General Counsel of the Commission added that comments were requested as to any other matters the Commission deemed relevant. The following brief is submitted in accordance with the request of the Court.

PRIOR PROCEEDINGS.

The Commission's order and certificate of September 26, 1961, permitted the Lehigh & New England Railroad Company to abandon all of its owned railroad lines, and the Central Railroad Company (through a subsidiary) to purchase 40 miles of the abandoned lines. Lehigh offered to accept the labor conditions prescribed by the Commission in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271, 281-82 (1952), and the Commission imposed such conditions in the present case (312 I.C.C. at 652).

The New Orleans conditions provide broad protection for affected employees, including protection, among others, against loss of wages, demotions in position, and moving expenses. The conditions also include a provision for compulsory arbitration of disputes.

The gravamen of the present suit, as stated in paragraphs 15 through 20 of the complaint, is that in January of 1962 Lehigh entered into agreements with the three unions representing plaintiff on Lehigh's lines providing that railroad workers (such as plaintiff) who reach the age of 65 are required to retire. Allegedly pursuant to those agreements the railroad has compelled the retirement of a number of employees and refused to continue to pay the protection ordered by the Commission.

Plaintiff alleges in paragraphs 19 and 20 of the complaint that "the New Orleans case * * * precluded the entering into and the carrying out of any forcible retire-

ment program," and that "the forced retirement program was a clear violation of the Act of Congress and the Order and Certificate of the Interstate Commerce Commission * * *."

Thus, like the dispute in this Court in *Roberts v. Lehigh and New England Ry. Co.*, 211 F. Supp. 379 (1962), aff'd 323 F.2d 219 (1963), the present case "arises out of the termination of their [the plaintiffs'] employment and their removal from the seniority rosters of the Lehigh Railway on June 30, 1962, pursuant to collective bargaining agreements between the Railway and the Brotherhoods providing for mandatory retirement at age 65." (211 F. Supp. at 381.) The equally pertinent provisions of the agreements are set forth by the Court of Appeals, as follows (323 F.2d at 221-22):

> The parties have agreed that all employees coming within the scope of the agreement "who have attained the age of 65, or who shall attain that age before July 1, 1962, shall be retired and their names removed from the seniority roster on June 30, 1962.
>
> "Employees who shall attain the age of sixty-five after June 30, 1962, shall be required to retire, and their names will be removed from the seniority roster.
>
> "Neither this agreement, nor any provision contained herein, shall be used as a basis for time or money claims against the Carrier. Disputes involved in the application of this agreement shall be disposed of by the officer of the Railway designated to handle such disputes and the General Chairman.
>
> "This agreement * * * shall cancel and supersede all previous agreements in conflict therewith * * *."

In *Roberts*, rather than enforce the Commission's order, plaintiffs argued that the retirement agreements were invalid and unenforceable, on the grounds, (1) they contravened the Railway Labor Act; (2) they circumvented certain provisions of the Washington Job Protection Agreement of 1936; and (3) they destroyed plaintiffs'

alleged rights to file claims with the local lodges or with the Railway. The appellate court affirmed this Court's dismissal of the suit on grounds it raised no claim upon which relief could be granted.

QUESTION PRESENTED.

We believe that the complaint presents but one issue for decision by the Court. We believe the question presented is simply whether employees may call upon this court to require arbitration of matters pursuant to a Commission order where the duly authorized representatives of the employees, including plaintiff, have agreed to a specific resolution of these matters by subsequent collective bargaining agreement.

STATUTE INVOLVED.

The Commission protects railroad workers who are adversely affected by approved financial transactions (such as mergers, purchases, acquisitions of stock control) pursuant to Section 5(2)(f) of the Interstate Commerce Act. This section provides:

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effec-

tive date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Section 5(8) of the Act, 49 U.S.C. 5(8), provides:

The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

Section 16(12) of the Act, 49 U.S.C. 16(12), provides:

If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

Finally, to complete the relevant statutory provisions, 28 U.S.C. 1336 provides:

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil

action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

POSITION OF THE INTERSTATE COMMERCE COMMISSION ON THE QUESTION PRESENTED.

It is the position of the Commission that the complaint does not allege a claim upon which relief can be granted in this Court, and that the action should be dismissed.

Technically, the cessation of payments to the retired employees has not resulted from the transaction approved by the Commission, but from a subsequent collective bargaining agreement. Section 5(2)(f) provides protection for only injuries that "result" from the transaction. Similarly, the present dispute does not appear to "arise with respect to the protection afforded" by the Commission, within the meaning of Section 8 (the arbitration provision) of the *Oklahoma* conditions,[1] attached as Exhibit I(d) to the complaint; nor does "any dispute or controversy arise * * * in connection with a particular coordination, including an interpretation, application or enforcement of any of the provisions" of the Washington Agreement.[2]

Beyond the technical language of the statute and of the protective conditions, it is clear that the plaintiff's effort to arbitrate his dispute with the railroads by using the Commission's order must necessarily result in circumventing and thereby undermining the binding effect of the retirement agreements between the railroad and plaintiff's duly authorized representatives. We agree with the brief of the defending railroads that plaintiff is here attacking the legality and effectiveness of the compulsory retirement

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[1] So named after the decision in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, 197-201 (1944).

[2] For the provisions of this agreement, see *Thompson v. St. Louis-San Francisco Ry. Co.*, 113 F. Supp. 900-903 (S.D. Ala. 1953).

agreements. We believe this must be so, not only from the face of the complaint, as the railroad shows, but also from the obvious fact that it is necessary to plaintiff's position that any arbiter of their claims be empowered to reach a result which may be contrary to the intention of the framers of retirement agreements. Unless the arbiter is only to arbitrate the meaning of the agreements, he will be authorized to circumvent and undermine these bargaining agreements. This result far exceeds the purpose of the Commission's arbitration provision.

Plaintiff does not seek arbitration of the meaning of the agreements. This, we assume in any event, is not a justiciable question; for "if the resolution of the differences between railroad employees, on the one side, and the railroad and the union, on the other, depends on the interpretation of disputed terms of the collective bargaining agreement, then the dispute must be sent to the National Railroad Adjustment Board, which has exclusive primary jurisdiction to make the interpretation." *Roberts* case, *supra,* 323 F.2d at 222.

What plaintiff seeks is an arbitration of a dispute that results from the entry by the unions and the railroad into agreements, and the railroad's actions taken allegedly pursuant to those agreements. Plaintiff improperly seeks an arbitration of the dispute outside and independent of those agreements. It is our position that plaintiff's rights, if any, must depend upon an interpretation of those agreements in a proper forum, rather than an interpretation or enforcement of a Commission order in this Court.

It may be noted at the outset that the question before the Court is not within the primary jurisdiction of the Commission. It concerns an interpretation of the statute and of private agreements. No citation of authority is necessary to establish that this Court is well-equipped to decide whether the retirement agreements take precedence over the protection granted by the Commission under Section 5(2)(f); and if any doubts may linger with respect to the interpretation of contracts, it is well-settled that this,

too, is a judicial and not an administrative function. *Walker v. United States,* 208 F. Supp. 388, 396 (W.D. Tex. 1962), aff'd 372 U.S. 526.

The protective conditions of the Commission's order, including the arbitration provision, were entered pursuant to the first two sentences of Section 5(2)(f). The third sentence expressly authorized the unions and the railroad to enter into "an agreement pertaining to the protection of the interests of said employees," quite apart from any protection ordered by the Commission.

In some cases, Commission decisions will take precedence over private agreements, pursuant to Section 5(11) of the Interstate Commerce Act, 49 U.S.C. 5(11). However, since implementing agreements entered pursuant to the third sentence of Section 5(2)(f) are expressly authorized "Notwithstanding any other provisions of this Act," their legal effect is to displace Commission-ordered protection and to provide that the rights of employees derive from the agreements and no longer from the order.

A controversy similar to the present one was decided by District Judge Miller in *Arnold v. Louisville and Nashville Railroad Company,* 180 F. Supp. 429 (M.D. Tenn. 1960). The Commission had approved a merger of two railroads, and had adopted the same *New Orleans* conditions for the protection of employees. Subsequent to the Commission's decision, the railroad and the duly authorized representatives of its employees entered into an agreement providing an additional separation allowance and a specific mode for arbitrating disputes. Plaintiff employees argued they were not affected by the agreement, and rested their claims solely on the Commission's order. The district court rejected their argument on the ground it "ignores" the third sentence of Section 5(2)(f), and added (at 433-34):

> Thus, while the statute requires the Commission to make provisions for the protection of employees adversely affected, it specifically reserves to the railroad employees the right, through their duly author-

ized representatives, to enter into an agreement with the railroad as to terms, conditions and arrangements for their own protection. Under this provision of the statute, as the Court construes its meaning and effect, the employees may, through a collective bargaining agreement with the railroad, make provisions for their own protection by adopting, supplementing or implementing the provisions made by the Commission for their protection. It would appear logically to follow that such an agreement takes the place of the order of the Commission insofar as the agreement and the order relate to the same subject matter. The Court, therefore, holds that any rights of plaintiffs to receive the lump sum payments they are seeking to recover derive from the Memorandum of Agreement effective January 16, 1958, and that such agreement is the foundation of their rights in this respect.

Since plaintiffs' rights are founded upon a contract, they cannot be maintained, under 28 U.S.C. § 1336, as actions to enforce an order of the Interstate Commerce Commission.

In a subsequent phase of that controversy, the L & N sought a declaratory order regarding the method to be employed in arbitrating the employee claims. *Louisville and Nashville R. Co. v. Cantrell,* 215 F. Supp. 229 (M.D. Tenn. 1962), aff'd *sub nom. Batts* case, *infra.* The district court added the following to its ruling in *Arnold* (at 233):

> The agreement, providing the method of arbitration, clearly pertained "to the protection of the interests" of the employees, and the Court is of the opinion that it was authorized both by the Interstate Commerce Commission's order and by the Interstate Commerce Act, that it is binding upon the railroad and the employees; and that the arbitration procedure to be followed is the procedure prescribed in the agreement itself.

* * * * *

> Further, Section 5(2)(f) of the Interstate Commerce Act, as heretofore pointed out reserves to the railroad and the duly authorized representative or representatives of its employees the right to enter into agreements pertaining to the protection of the interests of the employees.

The Court of Appeals for the Sixth Circuit sustained the *Cantrell* opinion in *Batts v. Louisville and Nashville R. Co.*, 316 F. 2d 22 (1963), holding, "that the agreement between the carrier and the representative of its employees was binding upon the employees *.* *." (at 27.)

The compulsory retirement agreements before this court likewise may change the protection afforded the employees as a result of the approved transaction; in either event the rights to benefits of employees required to retire thereafter flow from such agreements.

It may be expected that it is more typical, where the unions and the railroads are able to agree upon the protection to be accorded employees, that agreement is generally reached during the course of the proceedings before the Commission. Where employee unions and railroads have stipulated to a particular set of labor conditions, the Commission has consistently imposed such conditions for the protection of the union members. *E.g., Gulf, M. & O. R. Co. Purchase, Securities,* 261 I.C.C. 405, 434 (1945); *Erie R. Co. Trackage Rights,* 295 I.C.C. 303 (1956); *Delaware, L. & W. R. Co. Trackage Rights,* 295 I.C.C. 743 (1958). In some cases, the Commission has adopted such stipulated conditions for employees whose unions signed such agreements even when it was of the view that different protection should be adopted for employees not represented in the stipulation. See, *e.g., Wheeling & L. E. Ry. Co. Control,* 267 I.C.C. 163, 184 (1946); *Pere Marquette Ry. Co. Merger,* 267 I.C.C. 207, 235 (1947); *Detroit, T. & I. R. Co., Control,* 275 I.C.C. 455, 487 (1950); *Valdosta S. R. Purchase,* 282 I.C.C. 705, 711-12 (1952).

In more recent cases the Commission has held that, "as to employees covered by the aforementioned agreements, no conditions to our order are necessary"; and prescribed a set of conditions only for those "not protected by the foregoing stipulations and agreements." *Norfolk & W. Ry. Co. Merger,* 307 I.C.C. 401, 439 (1959). Or upon noting that a particular union-carrier stipulation was "of the character contemplated by section 5(2)(f) of the act for the protection of railroad employees who may be adversely affected by the authorized transaction," the Commission has simply held, "as to the employees covered by the stipulation, no conditions in our orders are necessary," and prescribed conditions only to protect "employees of the applicants [railroads] not covered by the aforesaid stipulation." *Chicago & N.W. Ry. Co. Purchase,* 312 I.C.C. 285, 296 (1960); and see *Duluth, S. S. & A. R. Co. Merger,* 312 I.C.C. 341, 356 (1960). Thus, even when protective conditions are stipulated during the course of the proceeding, the employees covered by such agreement must claim their benefits under and pursuant to such agreement, and not under or pursuant to the Commission order.

CONCLUSION.

It is our view that plaintiff's rights, to the extent the payment of protective benefits have been disrupted, if at all, by subsequent collective bargaining agreements, now flow from such agreements, rather than the Commission's order. Whether the retired employees should continue to receive benefits is a matter of the intention of the parties to the agreements. As the Court of Appeals noted in the *Roberts* case, this question is still open, and the affected employees may have a cause of action before the National Railroad Adjustment Board or for breach of contract; neither would flow from the Commission order. But as in the *Arnold* and *Cantrell* cases, the present Plaintiff may not use the Commission's order, or the processes of this Court pursuant to such order or to the statute, to

undermine the binding effect of implementing agreements made pursuant to the third sentence of Section 5(2) (f) of the Interstate Commerce Act.

Respectfully submitted,

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(Certificate of Service Omitted.)

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No. 20,326.

United States Court of Appeals

FOR THE SIXTH CIRCUIT.

RICHARD NEMITZ, *et al.*,

Plaintiffs-Appellees,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

DOCKET ENTRIES.

1970

Mar. 30. *Certified record* (7 vols. pleadings and exhibits), filed; and cause docketed

Apr. 3. Appearance of counsel for Appellant

Apr. 7. Motion of Appellant for permission to file brief in excess of page limitation, between 65 and 70 pages in length, with proof of service (Granted—JWP)

Apr. 16. Appearance of counsel for Appellant

May 7. Ten copies of Appendix

May 7. Proof of service of appendix

May 11. Twenty-five copies of Brief for Appellant

May 11. Proof of service of Brief for Appellant

June 10. Twenty-five copies of Brief for Appellees

June 10. Proof of service of brief for Appellees

June 29. Twenty-five copies of Reply Brief for Appellant

June 29. Proof of service of reply brief for Appellant

Sep. 28. Cause argued and submitted (Before: Celebrezze, Miller and Weinman, JJ.)

1971

Jan. 15. Judgment of the District Court modified and case remanded for further proceedings

Jan. 15. Opinion by Miller, J.

Jan. 25. Appellant's bill of costs, with proof of service

Jan. 27. Appellee's bill of costs, with proof of service

Feb. 1. Letter from counsel for Appellant requesting preparation of record for Supreme Court of the United States

Feb. 3. Motion of Appellant for stay of the mandate

Feb. 4. Certified record for certiorari application, including original record on appeal, mailed to Clerk of United States Supreme Court

Feb. 15. Order staying mandate thirty days (Miller, J.)

Feb. 17. Notice of filing petition for writ of certiorari 3/15/71 (Supreme Court No. 1470)

June 3. Certified copy of order of Supreme Court granting certiorari

No. 20,326.

UNITED STATES COURT OF APPEALS.

FOR THE SIXTH CIRCUIT.

RICHARD NEMITZ, *et al.*,

Plaintiffs-Appellees,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

OPINION OF COURT OF APPEALS.

(Decided and Filed January 15, 1971.)

Before: CELEBREZZE and MILLER, Circuit Judges, and WEINMAN, District Judge.*

MILLER, *Circuit Judge.* This action arose out of the merger of the Norfolk and Western Railway Company with the New York, Chicago & St. Louis Railroad Company (Nickel Plate), the lease by the Norfolk and Western of the Wabash Railroad Company, and the purchase by the Norfolk and Western of the Sandusky Line from the Pennsylvania Railroad. These transactions were authorized in 1964 by the Interstate Commerce Commission pursuant to the Interstate Commerce Act, 49 U.S.C. Sec. 5(2), 324 I.C.C. 1 (1964).

The appellees are employees of the Sandusky Line which was a part of the Toledo Division of the Pennsylvania Railroad. Sandusky was a seasonal line, operating only when Lake Erie was not frozen. Hence, the em-

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* Honorable Carl A. Weinman, Chief Judge, United States District Court for the Southern District of Ohio, sitting by designation.

ployees of Sandusky prior to the merger could work on that line part of each year. During the remainder of the year these employees worked on other parts of the Toledo Division of the Pennsylvania Railroad.

The appellees took the option given them to remain with Sandusky after its purchase by the Norfolk and Western, primarily because their respective residences were in Sandusky, Ohio.

In 1962, prior to the I.C.C. authorization of the merger, the union to which the appellees belonged, the Brotherhood of Railroad Trainmen, and several other unions, entered into an agreement with the Norfolk and Western. This agreement provided, *inter alia,* that the employees affected by the merger would not be placed in a worse position financially because of the proposed merger. The 1964 I.C.C. order authorizing the merger, lease, and purchase dealt with the protective benefits to be afforded the affected employees. Subsequently, a dispute arose as to payment of the protective benefits. In order to reach a compromise before arbitration was to have been initiated, the Norfolk and Western and the Brotherhood of Railroad Trainmen entered into Implementing Agreement 1-A (1967). Compensation for the appellees, according to this Agreement, would be based on the amount of time worked on the Sandusky Line alone—not, as the 1962 agreement provided, the time worked on the entire Toledo Division. The "test period" as in the 1962 agreement, was the twelve (12) months prior to the effective date of the merger. The appellees petitioned their union to initiate arbitration in order that they might receive those benefits to which they maintained they were entitled under the 1962 agreement.[1] The Brotherhood of Railroad Trainmen refused to arbitrate. Appellees then instituted this action in the court below.

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[1] The 1962 agreement contained an arbitration clause providing generally that any dispute or controversy arising between the Norfolk & Western and the union "with respect to the interpretation or application of any provision of this agreement . . . may be referred by either party to an arbitration committee for consideration and determination."

The complaint alleged that the provisions of the 1962 agreement were incorporated into the I.C.C. order of 1964; that the appellees were thus guaranteed by that order that they would not be placed in a worse position as to compensation as a result of the merger; that they were so placed by virtue of the merger; and that the Norfolk and Western had violated the provisions of the I.C.C. order. The appellees invoked the jurisdiction of the District Court to recover damages under 49 U.S.C. Sec. 9,[2] an injunction under Sec. 16(12), and attorneys' fees and cost under Sec. 8. The damages sought were based on the difference between compensation for time on the Sandusky Line alone during the test period and time worked on the entire Toledo Division,[3] including the time on the Sandusky Line, during the test period.

The appellant filed a Motion to Dismiss on three (3) grounds: (1) lack of subject matter jurisdiction; (2) accord and satisfaction of the claims of the appellees;[4] and (3) the failure of the appellees to exhaust their administrative remedies. The appellees filed a Motion for Sum-

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[2] Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.

[3] We construe the 1962 agreement as incorporated in the I.C.C. order as meaning that the appellees were to suffer no loss of compensation based upon their inability to work throughout the entire Toledo Division—not limited to their earnings on the Sandusky line alone. We reject the contention of appellant that the 1962 agreement intended to impose this limitation on compensation as distinguished from the "duration of employment" limitation of Sec. 3. However, we also construe the agreement as meaning that the employees shall not be protected to the extent that any loss of earnings is due to "a furlough because of reduction or decline in volume of traffic or revenues."

[4] The defense of accord and satisfaction, however, is not urged on appeal and will not be discussed herein.

mary Judgment. The District Court denied both motions. *Nemitz v. Norfolk & Western Ry. Co.*, 287 F. Supp. 221 (N.D. Ohio, W.D. 1968). Following the appellant's answer to the appellee's complaint, the District Court granted a second motion of appellees for summary judgment, from which appellant Norfolk and Western appealed. *Nemitz v. Norfolk & Western Ry. Co.*, 309 F. Supp. 575 (N.D. Ohio, W.D. 1969).

There are two primary issues to be resolved:

(1) Whether the District Court had subject matter jurisdiction to hear the appellee's action.

(2) Whether the appellees failed to exhaust their administrative remedies.

In order to case the issue as to subject matter jurisdiction in the proper context, a brief statement of the District Court's basis for finding jurisdiction is necessary.

The District Court found that the 1962 agreement had been incorporated into the 1964 I.C.C. order, such incorporation being necessary because Title 49 U.S.C. Sec. 5(2)(f) establishes minimum levels of protection for employees affected by the merger. By incorporating an agreement for the protection of employees in its order, the I.C.C. was merely fulfilling the duty imposed upon it by Sec. 5(2)(f). The effect of such incorporation is that the rights asserted by the appellees flow from the order and not from the collective bargaining agreement of 1962. Therefore, the District Court found jurisdiction under 49 U.S.C. §§ 5 and 9, and concluded that the National Railway Labor Adjustment Act did not apply. Furthermore, the District Court held that the appellees were not compelled to proceed under the 1962 agreement to arbitrate the basic dispute, but it did remit the parties to arbitration to determine the amounts to which the appellees are entitled.

The District Court then held that Implementing Agreement 1-A of 1967 did not deprive the District Court of jurisdiction. The basis of this holding was that the subsequent agreement was void as a matter of law in that it abridged the rights and protections afforded by the statute and the I.C.C. order.

Appellant argues that the rights asserted flow from a collective bargaining agreement and hence are to be determined by arbitration under the provisions of the Railway Labor Act. It further insists that Implementing Agreement 1-A superseded the I.C.C. order.

Essentially three subsidiary issues underlie a determination of subject matter jurisdiction of the court below. (1) Whether the appellees are required to proceed under the 1962 collective bargaining agreement; (2) whether the 1962 agreement was incorporated into the I.C.C. order of 1964; and (3) whether the 1967 Implementing Agreement 1-A superseded the I.C.C. order.

In deciding the jurisdictional issues thus presented, the Court must dispose of a preliminary question; whether the Railway Labor Act, 45 U.S.C. Sec. 153, et seq., is applicable, even if it be assured that the rights here asserted by the appellees stem from an I.C.C. order. If the Railway Labor Act applies, jurisdiction does not lie. *Brotherhood of Local Engineers v. Chicago & Northwestern Ry. Co.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1968).

49 U.S.C. Sec. 5(11) provides in part, that "the authority conferred by this section shall be *exclusive* and *plenary*." (Emphasis added.) Various cases dealing with consolidations pursuant to 49 U.S.C. Sec. 5 justify our emphasizing the words "exclusive" and "plenary." *Brotherhood of Loc. Eng. v. Chicago & Northwestern Ry. Co., supra; Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169 (1961); *Railway Labor Executive Association v. United States*, 339 U.S. 142 (1950); *United States v. Lowden*, 308 U.S. 225 (1939). These cases dealt with the propriety of granting exclusive authority to the Interstate Commerce Commission in consolidations pursuant to 49 U.S.C. Sec. 5, and with the intent of Congress as evidenced by the defeat of the Harrington Amendment.[5] The cumulative effect of the decisions is that there

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[5] The Harrington Amendment would have brought about a job freeze of existing employees and, thus, "threatened to prevent all consolidations to which it related." Railway Labor Executives' Assoc. v. United States, *supra* at 150-151.

must be exclusive and plenary authority in the I.C.C. to achieve the purposes of the Act. The authority vested in the I.C.C. to effectuate proposed mergers would be rendered ineffective if authority to adjust work realignments through fair compensation did not exist. Since, under the Railway Labor Act, employees cannot be compelled to accept or arbitrate new working rules or conditions, the application of the Railway Labor Act to situations such as that presented here, like the Harrington Amendment, would threaten to prevent many consolidations, and, therefore, should not be applied. *Brotherhood of Loc. Eng. v. Chicago & Northwestern Ry. Co., supra.*

It is the contention of the appellant that the I.C.C. did not incorporate the protective conditions for the appellees into its 1964 order authorizing the merger. The argument proceeds that since the provisions of the 1962 agreement were not incorporated, the rights asserted by the appellees cannot stem from the order, and, therefore, the federal courts are without jurisdiction. The rationale in support of this contention is that: (1) the appellees' suit is based on protective benefits afforded them under the 1962 agreement; (2) the 1962 agreement was an agreement made pursuant to the last sentence of 49 U.S.C. § 5(2)(f) and was independent of the I.C.C. order; (3) § 5(2)(f) was intended as an alternative to I.C.C. imposed protective conditions for the benefit of affected employees; and (4) the I.C.C. not having incorporated these conditions federal jurisdiction does not lie. Appellant adds that the appellees' union affirmed this interpretation when it refused to arbitrate.

The position now taken by the appellant is contrary to its position previously taken. For example, it is to be noted that the appellant's Answer to the Complaint of the appellees admitted that the 1962 agreement was incorporated into the authorization order of the I.C.C. in 1964. Also, all interested parties entered into a "Stipulation and Agreement" before the Commission, which provided that the provisions of the 1962 agreement "shall be applied for the protection of the interests of the employees . . . as required by § 5(2)(f) of the Interstate Commerce Act. . . ."

After a consideration of the record in the instant case, we are of the opinion that all parties understood that the provisions relating to benefits for affected employees in the 1962 agreement would be, and were, incorporated into the I.C.C. order. In addition, we are of the opinion that the Commission, by incorporating the 1962 agreement, was fulfilling the requirement of 49 U.S.C. § 5(2)(f), which provides, in part:

> As a condition of its approval, under this paragraph . . ., the Commission *shall require* a fair and equitable arrangement to protect the interests of the railroad employees affected. 49 U.S.C. § 5(2)(f). (Emphasis added.)

The applicable case law tends to support the interpretation of the words, "shall require," as imposing upon the I.C.C. the duty to make provisions for the protection of affected employees. *Railway Labor Executives' Assoc. v. United States, supra; Brotherhood of Maintenance of Way Employees v. United States, supra; Clemens v. Central R.R. Co. of New Jersey,* 264 F. Supp. 551 (E.D. Penn. 1967), *reversed* (on other grounds), 399 F.2d 825 (3rd Cir. 1968); *cert. denied,* 393 U.S. 192 (1969), and others.

In this regard, the appellant argues that the I.C.C., as it has in various other cases cited by the appellant, noted that it would not impose protective benefits for the appellees because of the existence of the 1962 agreement. Since, as appellees argue, the 1962 agreement was made pursuant to the last sentence of § 5(2)(f), and since the I.C.C. stated that it need not provide for protective conditions by virtue of the fact that an agreement dealing with protective conditions was already in existence, appellant reasons that the 1962 agreement was not incorporated into the order. However, the existence of a prior agreement does not allow the I.C.C. to ignore its statutory duty. On the contrary, the I.C.C. is required, as we have noted, to impose employee protective conditions whether derived from an agreement or independently formulated by the I.C.C. This is precisely the situation now before the Court. The I.C.C. first deter-

mined that the protective conditions in the 1962 agreement were adequate and then concluded that it did not deem itself compelled to elaborate on those conditions, merely stating that the conditions were subject to the order. It is significant that, regarding the protection of employees not covered by the 1962 agreement, the I.C.C. did separately impose protective conditions in the same order. We find that the 1964 order in disclaiming the necessity for protective conditions, must be construed as meaning that such conditions need not be spelled out or elaborated in the 1964 order since they were sufficiently covered by the 1962 agreement, a construction which is consistent with the theory of incorporation as well as with the I.C.C.'s statutory duty. We conclude that the rights set forth in the 1962 agreement were incorporated in the 1964 order and for purposes of federal court jurisdiction stem from such order. The appellant in taking a contrary position relies upon the case of *Arnold v. Louisville & Nashville R.R. Co.*, 180 F. Supp. 429 (M.D. Tenn. 1960), as *affirmed* by the Court of Appeals in *Batts v. Louisville & Nashville R.R. Co.*, 316 F.2d 22 (6th Cir. 1963). We do not deem *Arnold* to be controlling on the facts presented here. See *Clemens v. Central R.R. Co. of New Jersey*, 264 F. Supp. 551 (E.D. Penn. 1967), reversed (on other grounds), 399 F.2d 825 (3rd Cir. 1968), *cert. denied*, 393 U.S. 192 (1969). In *Arnold*, the plaintiffs were railroad employees seeking damages in federal district court for breach of protective conditions allegedly flowing from an I.C.C. order authorizing a merger, affecting the plaintiffs. As contemplated by the order, the plaintiffs' union had entered into a collective bargaining agreement with the railroad subsequent to the I.C.C. order in question. This collective bargaining agreement dealt with conditions and arrangements for the protection of employees and sought to supplement the prior I.C.C. order as to these conditions. In asserting their rights to damages, the plaintiffs argued that their representatives were without authority to "bargain away" rights derived from the I.C.C. order. In rejecting the plaintiffs' argument, the District Court held:

> Under this provision of the statute (the last sentence of Sec. 5(2)(f), as the Court construes its meaning and effect, the employees may, through a collective bargaining agreement with the railroad, make provisions for their own protection by *adopting, supplementing* or *implementing* the provisions made by the Commission for their protection. Arnold v. Louisville & Nashville R.R. Co., *supra,* 433-434. (emphasis added.)

The District Court then concluded that the plaintiffs' representatives properly exercised their authority in reaching such an agreement with the railroad and that the agreement displaced the I.C.C. order insofar as it related to the same subject matter. Since the rights asserted necessarily stemmed from the agreement and not the I.C.C. order, those rights could be vindicated neither in an action to enforce an order of the I.C.C., under 28 U.S.C. Sec. 1336, nor in an action for damages under 49 U.S.C. Secs. 8 and 9. Although the *Arnold-Batts* decision did not reach the question of whether the Railway Labor Act was applicable, the Court did observe that, even if the Railway Labor Act was inapplicable, the plaintiffs were required to exhaust their administrative remedies. *Arnold v. Louisville & Nashville R.R. Co., supra,* at 434.

Appellant next contends that Implementing Agreement 1-A superseded the Commission's order of 1964. The contention is that the effect of the 1967 agreement was to preclude the appellees from asserting their claims in the District Court and to vest exclusive jurisdiction in the National Railroad Adjustment Board. This argument also addresses itself to the subject matter jurisdiction of the District Court.

The District Court ruled that Implementing Agreement 1-A was void as a matter of law because it abridged the rights and protections afforded by the statute and the I.C.C. order.

The appellant again asserts that the last sentence of § 5(2)(f) is an alternative to the first two sentences thereof. Appellant contends that no minimum level of protec-

tion for employees is required by the Act and that a voluntary collective bargaining agreement does not have to be consistent with the I.C.C. order. Appellant also argues that the ruling by the District Court has the effect of "second-guessing" the duly constituted bargaining representative of the appellees. Finally, appellant again urges that the *Arnold* case as affirmed by this Court requires us to hold that the subsequent agreement superseded the I.C.C. order insofar as it related to the same subject matter.

The effect of the *Arnold* case on the collective bargaining agreement here (Implementing Agreement 1-A), must be viewed within the context of the second sentence of § 5(2)(f). That sentence provides:

> In its order of approval the Commission *shall* include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order *being placed in a worse position* with respect to their employment. . . . 49 U.S.C. § 5(2)(f). (Emphasis added.)

Cases construing the Act have held that this language means that employees shall not be placed in a worse position with respect to compensation and that no "job freeze" is required. *Brotherhood of Maintenance of Way Employees v. United States, supra,* pp. 176-177. In *Arnold,* the Court did *not* hold that the collective bargaining agreement placed the employees in a worse position, but rather that the agreement in question *supplemented* the I.C.C. order. Here the subsequent agreement abridged rights previously vested in the appellees by virtue of the I.C.C. order. The agreement in *Arnold* did not take away rights already granted, but merely added a new term to the I.C.C. order. The agreement now before us, in contrast, goes to the very heart of the protections to be afforded the appellees under the order. Furthermore, we find Implementing Agreement 1-A to be contrary to the policy of the Act, as

embodied in the second sentence of § 5(2)(f), which expressly makes provision to protect employees affected by a merger. The appellees here would appear to be precisely those employees protected by the provisions of the Act. The merger split their seniority district and, as a result, they were unable to receive the working time previously obtainable before the merger—no matter which option they chose. As the 1967 agreement abrogated certain rights and protections previously guaranteed to the appellees, we are in agreement with the District Court that the agreement is unenforceable. An agreement made pursuant to the last sentence of § 5(2)(f) may vary the protections afforded by the I.C.C. order, but it may not substantially abrogate employees' rights grounded in an I.C.C. order. Nor may it frustrate the policy of the Act, as Implementing Agreement 1-A clearly did in the present case.

In the alternative, appellant attacks the jurisdiction of the District Court on the basis of an alleged failure of the appellees to exhaust their administrative remedies. Appellant urges that the appellees are required to exhaust such remedies because of the arbitration clause contained in the 1962 agreement which, as we have seen, used the language "may be referred." This contention also looks to the *Arnold* case, as affirmed by this Court in the *Batts* case, for authority. If its contention that arbitration is required under the I.C.C. order is sustained, the appellant then contends that the appellees' application to the union to arbitrate followed by the latter's refusal to do so, did not constitute the required exhaustion before invoking judicial intervention, citing *Vaca v. Sipes*, 386 U.S. 171 (1967).

The District Court on alternative grounds ruled in favor of the appellees on the exhaustion issue. First, the District Court noted that the appellees had reached a "dead-end street" in their attempt to utilize union remedies and that the doctrine of exhaustion presupposes an adequate remedy, citing *Marsh v. County School Board*, 305 F.2d 94 (4th Cir. 1962). The District Court also concluded that the arbitration provision in the I.C.C. order was "permissive," and, since neither the union nor the

appellant had invoked arbitration it was not required and the District Court had jurisdiction of their claim.

A number of authorities have been examined to determine the effect of the words "may be referred" in an arbitration clause, including, in addition to the opinions in *Arnold* and *Batts, supra, Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30 (1957); *New Orleans & Northwestern R.R. Co. v. Bozeman*, 312 F.2d 264 (5th Cir. 1963); *Parsons v. Norfolk & Western Ry Co.*, 310 F. Supp. 1197 (S.D. W.Va. 1970); *Bonnot v. Congress of Independent Unions, Local #14*, 331 F.2d 355 (8th Cir. 1964); *Brotherhood of Local Engineers v. Chicago & Northwestern Ry. Co., supra.* All of these cases may be cited as support for the proposition that the use of the word "may" does not necessarily mean that the arbitration clause is permissive. Perhaps the strongest statement in this regard is to be found in the *Bonnot* case, wherein the Court of Appeals for the Eighth Circuit held:

> The obvious purpose of the 'may' language is to give an aggrieved party the choice between arbitration and the abandonment of its claim. Bonnot v. Cong. of Independent Unions, *supra*, p. 359.

In *Batts* this Court held that the "may" arbitration clause was mandatory and not permissive, citing the *Bozeman* case, wherein the Court of Appeals for the Fifth Circuit interpreted and relied upon the *Chicago River & Indiana* case.

> The crucial language of the *Bozeman* opinion is:
>
> We conclude that Section 8 of the Oklahoma Conditions gave either party the absolute right to select arbitration as a means for settling disputes and when such selection was made then arbitration was mandatory on the other party. New Orleans & Northwestern R. R. Co. v. Bozeman, *supra*, at p. 267.

The Court of Appeals went on to say, "We think this is the teaching of the Supreme Court's opinion in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R. Co.*"

It is manifestly clear that the proposition upheld in each of the above cases is that the election by one of the parties to an agreement to arbitrate makes the clause compulsory, not that the clause is in all events mandatory. It is significant that in *Arnold-Batts,* in *Bozeman,* and in *Chicago River & Indiana R.R.,* involving the "may" language, one party had elected to submit the dispute in question to arbitration, and that each court then concluded that the arbitration clause because of such election became mandatory as to the other party.

In *Bonnot,* the Court of Appeals made the statement, quoted *supra,* which in effect characterized the "may" clause as absolutely mandatory, relying upon *Steelworkers v. American Manufacturing Company,* 363 U.S. 564 (1960) and *Deaton Truck Line, Inc. v. Local Union #612,* 314 F.2d 418 (5th Cir. 1962). The *Deaton Truck Line* case interpreted the *American Manufacturing Company* case, and citing that case, the Court of Appeals stated:

> Clearly, however, "may" should be construed to give either party the option to require arbitration. Deaton Truck Line, Inc. v. Local Union #612, *supra,* p. 422.

Thus the cases cited by *Bonnot* do not compel the conclusion reached by the Eighth Circuit that the "may" clause is absolutely mandatory, in the sense of requiring either arbitration or abandonment of the aggrieved party's claim.

We are persuaded that the arbitration clause now before us was permissive until such time as the union or the appellant invoked arbitration. If either had done so, arbitration would have been required. As neither the union nor the appellant invoked arbitration, the clause remained permissive and the appellees may not be said to have failed to have exhausted their administrative remedy by virtue of the fact that their grievances were not submitted to arbitration.

We further are of the view that the appellees in this case have fulfilled any possible requirement for exhaustion of administrative remedies in that they sought to have arbitration invoked and were refused that remedy by their

union. In pressing their grievances, the appellees had gone as far as they could have gone within the grievance settlement machinery.

The appellant cites the case of *Republic Steel Corporation v. Maddox*, 379 U.S. 650 (1965), as authority for the proposition that the appellees had not gone far enough to excuse the exhaustion requirement. *Maddox* holds that the employees "must attempt use of the contract grievance procedure agreed upon by the employer and the union as the mode of redress." In *Maddox*, the Supreme Court reasoned that the union should be given the "opportunity to act" in order that the policy of preserving union influence may be effectuated. The record here supports the finding that the appellees did "attempt" such use of the contract grievance procedure within the meaning of *Maddox*, but that they were frustrated in this attempt when the union refused to request arbitration. Thus to hold on such facts that administrative remedies have been exhausted would in no way undermine union influence which was of primary concern to the Supreme Court in the *Maddox* ruling.

Appellant calls our attention to the case of *Vaca v. Sipes, supra*, an employee action against the union for breach of its duty of fair representation, wherein the Supreme Court indicated that exhaustion was not excused unless the employee proved that the union had breached its statutory duty of fair representation. To constitute such a breach, the union must have acted in an arbitrary, discriminatory, or bad faith manner. However, the Supreme Court also indicated in *Vaca v. Sipes* that an exception to the exhaustion requirement may exist where the effort to proceed with further administrative remedies would be futile. In the later case of *Glover v. St. Louis-S.F.R. Co.*, 393 U.S. 324, 330 (1969), the Supreme Court affirmatively recognized the validity of this exception. That it would have been a futile gesture for the appellees to have attempted to proceed further with the arbitration procedure, is readily apparent from the record before us.

Having concluded that the rights of the parties should be declared in accordance with this opinion, we come to the question of damages.

In accordance with the terms of the I.C.C. order, appellees are entitled to damages pursuant to 49 U.S.C. Secs. 8 and 9 to the extent that their compensation has been diminished by their inability to perform work throughout the Toledo Division. To the extent that their compensation may have been diminished by furloughs due to seasonal requirements, or by any decline in traffic or revenues, they are not entitled to damages. In these conclusions we are in agreement with the District Court. We do not agree, however, as the District Court held, that the question of damages should be determined by arbitration. Rather, it appears to us that since the District Court has jurisdiction of the appellees' claims, it must adjudicate those claims in their entirety—the basic dispute between the parties as well as the relief to be afforded to each appellee.

Accordingly, the judgment of the District Court will be modified in accordance with this opinion and the action will be remanded to the District Court for further proceedings.

Modified and remanded for further proceedings.

No. 20,326.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

RICHARD NEMITZ, *et al.*,

Plaintiffs-Appellees,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant-Appellant.

BEFORE: CELEBREZZE and MILLER, *Circuit Judges* and WEINMAN, *District Judge.*

JUDGMENT.

(Filed January 15, 1971.)

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel,

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby modified and the case remanded to the District Court for further proceedings consistent with the opinion.

It is further ordered that costs on appeal be taxed three-fourths to the Defendant-Appellant, Norfolk and Western Railway Company and one-fourth to the Plaintiffs-Appellees, Richard Nemitz, et al., and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

EXCERPT FROM REPORT AND ORDER OF INTERSTATE COMMERCE COMMISSION, F. D. No. 21510.

* * * * *

(72*)

Employee conditions.—As previously stated herein and in Appendix A, various agreements have been reached between employee representatives and the Norfolk & Western for the protection of employees adversely affected by these transactions. Our authorizations herein will, by reference, be made subject to such agreements. For the benefit of employees not covered by such agreements, the hearing examiner recommended the imposition of protective conditions similar to those imposed in *Oklahoma Ry. Co. Trustees Abandonment,* 257 I.C.C. 177. However, it has been our experience in proceedings (73) of this nature that more adequate protection is afforded by the conditions prescribed in *Southern Ry. Co.-Control-Central of Georgia Ry. Co.,* 317 I.C.C. 557, as supplemented and clarified in 317 I.C.C. 729 and 320 I.C.C 377. Therefore, the conditions prescribed in the latter case will be imposed by reference in our order for the protection of railway employees not covered by the agreements and adversely affected by the transactions. For the purpose of such conditions, as far as the acquisition of stock control of the Wabash by the Norfolk & Western is concerned, the effective date of our order is to be the date of consummation of such stock control.

We find that, as conditioned herein, the transactions under consideration meet the requirements prescribed by sections 5(2) and 20a of the Act and conform generally with the purposes and objectives of the national transportation policy declared by Congress. We are convinced that the transactions should be approved.

* * * * *

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* Boldface numerals in parentheses throughout this appendix refer to the original typewritten pages.

EXCERPT FROM APPENDIX TO THE I.C.C.'s REPORT AND ORDER.

* * * * *

(33) Norfolk & Western has entered into an agreement with 19 of the principal labor organizations, members of the Railway Labor Executives' Association, for the protection of employees of Norfolk & Western, Nickel Plate and Wabash, as well as persons employed on the Sandusky Line of Pennsylvania, represented by these organizations. This agreement, which provides for the assumption by Norfolk & Western of all outstanding labor contracts, schedules and agreements of Nickel Plate and Wabash, as well as those having application on the Sandusky Line, basically requires that job eliminations as a result of the unification be accomplished only through normal attrition. Under its terms, Norfolk & Western agrees to take into its employment, upon consummation of the merger, lease and purchase, all employees of the lines involved with the guarantee that they will not be adversely affected in their employment as a result of the proposed transactions or for any reason other than furloughs due to seasonal requirements or a decline in volume of traffic or revenue.

The agreement also authorizes Norfolk & Western to transfer the work of employees throughout the merged system and requires the labor organizations to enter into implementing agreements permitting employees either to follow their work or be assigned to other jobs within their craft or class within the same general locality as existing jobs, following a period of retraining, if necessary, at Norfolk & Western's expense.

Norfolk & Western has also entered into an agreement with the Great Lakes Licensed Officers' Organization, a labor organization representing certain marine employees of Wabash, which provides for the assumption by Norfolk & Western of all outstanding labor contracts, schedules and agreements between Wabash and the Great Lakes Licensed Officers' Organization, and further provides, in effect, that no employee of Wabash who is a member of

the named organization will be adversely affected in his employment as a result of the proposed lease or merger of Wabash by or into Norfolk & Western.

It was stipulated that under any report and order approving the proposed merger, lease and purchase it may be considered that these agreements were made pursuant to and in conformity with section 5(2)(f) of the act for the protection of the covered employees.

* * * * *

LETTER, APRIL 7, 1966, N&W VICE PRESIDENT H. C. WYATT TO BROTHERHOOD GENERAL CHAIRMAN J. F. McNEEL.

Merger claims of Sandusky District Trainmen and Conductors—October 16, 1964, through November, 1965—

April 7, 1966

Mr. J. F. McNeel, General Chairman,
Brotherhood of Railroad Trainmen,
Room 209,
683 East Broad Street,
Columbus 13, Ohio.

Dear Sir:

Please refer to our conference in your office at Columbus, Ohio, on March 31, 1966, at which were also present Messrs. P. V. Hemmer, J. E. Fitz and C. R. Mick of your Committee, when the claims of various Sandusky District Trainmen and Conductors, allegedly adversely affected by the merger under the provisions of Section 3 of the Agreement of January 10, 1962, were considered.

We agreed to dispose of forty-six of these claims for the period October 16, 1964, through November, 1965, under the provisions of letter of understanding addressed to you under date of October 25, 1965, by the allowance

of the net amount shown opposite the respective names of employes listed on attached statement, less applicable deductions.

It was further understood and agreed that this settlement is made without prejudice to the position of either party and with reservations made by members of your Committee providing for further consideration of certain of these and several additional claims of record covering the above-mentioned period.

It was determined in conference there was nothing due the following employes:

G. M. Murray	M. D. Kerber	E. R. Geiger
W. L. Butler	J. K. Dahnke	J. F. Fortuna
C. E. Mills		

Yours truly,

H. C. Wyatt,
Senior Vice President.

B/C
WAN
REP

WSP—Please arrange payment as soon as practical, advising payroll period on which allowed.

LETTER, APRIL 11, 1966, BROTHERHOOD GENERAL CHAIRMAN J. F. McNEEL TO N&W VICE PRESIDENT H. C. WYATT.

GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF RAILROAD TRAINMEN
PENNSYLVANIA SYSTEM-LINES WEST
CHICAGO UNION DEPOT CO.
DINING CAR STEWARDS

Room 209, 683 East Broad Street
Columbus, Ohio 43215

April 11, 1966

Mr. H. C. Wyatt
Senior Vice-President
N & W Railway Company
Roanoke, Virginia

Dear Sir:

This refers to your letter of April 7, 1966, referring to the conference in this office on March 31, 1966 at which you were represented by Mr. Fred Yancey, when the claims of various Sandusky District trainmen and conductors adversely affected by the merger under the provisions of Section 3 of the Agreement of January 10, 1962, were considered.

I have checked the attached list of amounts due thirty-nine (39) claimants and the figures on this sheet are correct. We will appreciate prompt payment of any amounts due and request this office and the Local Chairman be advised when these payments are made.

We want it clearly understood by all concerned that in final settlement of all these claims only the earnings made on the Sandusky District Scioto Division by the claimants should be used to offset their monthly guarantee, reasoning that only monies made on this territory were used to compile their guarantee. It just is not logical to restrict their protective guarantee earnings to monies earned in the twelve months prior to the merger on the Sandusky District only and then use monies made at

Bellevue, Fostoria, N & W proper yard, Columbus, Ohio, other railroads and private industry.

As stated above, we are agreeable to accepting the amounts listed on the attached list, until this matter is finally resolved as the claimants are in dire need of the money. We do anticipate further handling of this matter, as soon as prior commitments will allow. We will advise you of what steps we desire at some future date.

Your choice of Mr. Yancey to handle this matter is excellent, as he is well versed in the subject and certainly conducts himself in a manner which tends for amiable negotiations.

Yours very truly,

/s/ J. F. McNeel,
General Chairman.

cc: Mr. J. M. King, VP
Mr. C. R. Mick, LC No. 141
Mr. G. C. Gibson, Sec. No. 141
Mr. J. Fitz, LC No. 844
Mr. H. I. Fearing, Sec. No. 844
PVH: pm

LETTER, OCTOBER 12, 1966, BROTHERHOOD GENERAL CHAIRMAN J. F. McNEEL TO N&W VICE PRESIDENT W. A. NOELL.

BROTHERHOOD OF RAILROAD TRAINMEN

October 12, 1966

Mr. W. A. Noell, Vice-President
Personnel
N & W Railway Company
Roanoke, Virginia

Dear Sir:

This has reference to your letter of October 4, 1966 concerning the "test period" of the Conductors and Brakemen on the Sandusky District, Scioto Division, as provided under Section 3 of the January 10, 1962 Agreement for the Protection of Employees.

Attached to your letter was a new list of 'test period earnings' which you received from the Pennsylvania Railroad Company. We have checked the new list against the original list, furnished you by the Pennsylvania Railroad Company in March 1965, and found that the figures presented on the new list are definitely unacceptable to us.

We have attached a comparison list of the Conductors and Brakemen whose entire 'test period earnings' were made on the Sandusky Line in the twelve (12) months prior to October 15, 1964. The left hand column on the comparison list shows the earnings furnished by the Pennsylvania Railroad Company in March, 1965, without the seven percent (7%) wage increase being added from June, 1964 to October 15, 1964 inclusive and you can readily see that the right hand column shows far lesser amounts than the original list.

At our meeting on August 3, 1966 in Roanoke, we had the clear understanding that the original list furnished you by the Pennsylvania Railroad Company would be the figure acceptable to us and that we would agree to certify the figures shown on the original list, with certain corrections for Mr. K. D. White and Mr. R. S. Shilling, and the agreed upon seven percent (7%) wage increase added on.

We also agreed that we would again meet with you and work out an acceptable formula for the remaining trainmen, who made either part of their 'test period earnings' on the Sandusky Line, and for the few men who had no "test period earnings" on the Sandusky Line.

We cannot understand why you would deviate from our agreed upon principles established in our August 3, 1966 meeting and attempt to use the more recent and definitely inaccurate list you mailed with your letter of October 4, 1966.

Please arrange to have the list of the one hundred percent (100%) Sandusky earnings men completed so that we may certify this list and then move on to the remaining men, who do not have one hundred percent (100%) Sandusky earnings.

Yours very truly,

/s/ J. F. McNeel,
General Chairman.

cc: J. M. King, VP-BRT
Messrs: Mick, Fitz, Fearing, Gibson
PVH: pm

LETTER, FEBRUARY 23, 1966, BROTHERHOOD VICE PRESIDENT F. C. MONTGOMERY TO N & W VICE PRESIDENT H. C. WYATT.

BROTHERHOOD OF RAILROAD TRAINMEN

February 23, 1966

FCM—mg

Mr. H. C. Wyatt, Senior Vice President
Norfolk and Western Railway
Roanoke, Virginia

Dear Sir:

Please refer to your letter addressed to me under date of April 23, 1962 confirming our discussions in Washington, D.C. on that date, concerning the proposed agreement for protection of employees in event of approval of merger and related applications filed by the Norfolk & Western Railway Company and other carriers in ICC Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514, and I would like to deal with a pertinent part of that letter found on Page 3, which is identified as and titled VIII, Section 3.

As you will recall Vice President J. M. King accompanied me at this meeting and considerable time was spent in discussing the district from which the men who would cover the new Norfolk & Western Railway you propose to buy from the Pennsylvania Railroad, from Sandusky to Columbus, Ohio, which you advise will serve as the connecting link between the Norfolk & Western at Columbus and the Nickel Plate at Bellevue, Ohio.

If my memory serves me correctly, you had a map of the proposed system on the wall of your private car and in discussion of the particular phase of your merger I pointed out to you that the seniority district for these men encompassed Sandusky, Toledo and Columbus and advised, when we were talking, about how the men would make the transfer from Pennsylvania employment to N&W employment why it would be necessary to place bulletins at all three points so that the 50 senior men

would have first opportunity for their job in seniority order on the Norfolk & Western.

I am now advised that your representatives are holding that the area from Sandusky to Columbus comprises the seniority district, contrary to my understanding with you on April 23, 1962.

I am told that the seniority district for the men who took employment with your merged railroad over the so-called Scioto Division held seniority on a common seniority roster on the Pennsylvania Railroad Toledo Division, Lake Region and exercised seniority indiscriminately on the former Sandusky line of the Toledo Division, Toledo, Ohio-yard and road, Detroit-yard and Columbus-road, and in exercising their seniority their position on the seniority roster of this particular district was gven full recognition.

It was not my understanding when we met in 1962 that these men would be deprived of any of the benefits contained in this protective agreement when adversely affected, but we now find that you are holding that employees from this common seniority board are being afforded protection in ratio to their earnings on the so-called Sandusky line.

May I remind you of one point in our conversation where I advised you that it would be entirely possible that a man from Toledo who had not worked on the Sandusky line for years might, by reason of seniority, decide to assert that seniority and take employment with your Company over this new Norfolk & Western Railroad and both Vice President King and I were assured these men would receive full consideration.

It seems regrettable that an agreement which had the appearance of being one of the most outstanding merger agreements has now reached such a low point as to deprive men who could have stayed with the Pennsylvania but chose to take employment with your carrier are now being deprived of the benefits which I understood would be accruing to them in the event they asserted such prerogative.

I will appreciate a reply from you outlining the position you now take.

Very truly yours,

/s/ F. C. MONTGOMERY, *Vice President*

Manager, Field Service Department.

cc: Mr. F. K. Day, Jr, Asst V.P., N&W RR.
Mr. J. M. King, V.P., BRT
Mr. J. F. McNeel, Gen. Chmn., BRT
Mr. J. E. Fitz, Loc. Chmn., BRT

DEPOSITION OF W. A. NOELL.

(Taken on Behalf of the Defendant.)

* * * * *

(38)

CROSS EXAMINATION.

By Mr. Murray:

* * * * *

Q. Using this language, how do you work out a formula for a man who has not worked at all in the Sandusky Branch of the Pennsylvania Railroad Co.? A. The man who has not worked at all, or who did not work at all—receive any compensation for work performed on the Sandusky Branch prior to the merger, has no protective allowance due him, if he elected to accept employment on the Sandusky Branch subsequent to the merger.

* * * * *

(40) Q. Do I understand that your position—to be, Mr. Noell, that if a man had not worked on the Sandusky Branch during the year preceding the merger, that whether or not he would be placed in a worse position with respect to his compensation, the Norfolk & Western owed him no protective benefits whatever? A. That is true.

* * * * *

(42) Q. Well, were you familiar with the correspondence, dealing with this matter we are discussing this morning, to Mr. Wyatt from representatives of these employees? A. I rather doubt that I would have been sent any of that correspondence prior to my appointment as Vice-President Personnel. It might depend on the particular letter.

(Plaintiff's Exhibit No. 3, Noell Deposition—. Letter, dated February 23, 1966, from F. C. Montgomery to H. C. Wyatt.)

Q. I will hand you Plaintiff's Exhibit No. 3, Noell Deposition, and will ask you whether or not you are

familiar with this document or the contents of that document? A. Yes. I recall this letter—and this letter did come to my attention.

Q. Let me ask you, who is Mr. Montgomery? A. Mr. Montgomery, as I recall, had the title of Field Representative for the Brotherhood of Railroad Trainmen, and he was—his headquarters were at Cleveland.

Q. Do you know whether or not he would be a superior (43) of Mr. McNeel's in the Brotherhood organization? A. I would say that he would be.

Q. Thank you. Now, Mr. Noell, do you have a copy of this letter, for convenient reference? Paragraph six and seven on Plaintiff's Exhibit No. 3—specifically, the language which reads:

> "It was not my understanding when we met in 1962 that these men would be deprived of any of the benefits contained in this protective agreement when adversely affected, but we now find that you are holding that employees from this common seniority board are being afforded protection in ratio to their earnings on the so-called Sandusky line. May I remind you of one point in our conversation where I advised you that it would be entirely possible that a man from Toledo who had not worked on the Sandusky line for years might, by reason of seniority, decide to assert that seniority and take employment with your Company over this new Norfolk & Western Railroad and both Vice President King and I were assured these men would receive full consideration."

Now, my question to you, Mr. Noell, is, in view of that language, how can you testify here this morning that you were not aware of the fact that (44) Mr. McNeel and representatives of these employees have taken the position that those men with less than one hundred percent Sandusky Line earnings could have protective benefits coming to them?

Mr. Curphey: Object to the question.

By Mr. Curphey:

Q. Go ahead and answer it, Mr. Noell. A. This letter, apparently, stems from some complaint that the employees took directly to Mr. Montgomery's office. I think that the fact that he wrote this letter, standing alone, doesn't mean too much. I think we ought to include the answer that he got from Mr. Wyatt.

By Mr. Murray: (Continuing)

Q. Anything you want to include, of course, can be included in Mr. Curphey's redirect examination. My question to you, Mr. Noell, is, in view of your testimony that you were acquainted with this letter, is it not a fact that you were aware, during the time that you were dealing with this problem, that at least Mr. McNeel's superior was of the position that those men with less than full one hundred percent Sandusky Line earnings would be entitled to protective benefits? A. I recall seeing this letter, which is dated in 1966. If I recall my earlier testimony, I said that at a certain period—or during the negotiations I had not heard Mr. McNeel take any position that anything other than Section 3 applied to the Sandusky District employees.

(45) Q. Isn't it a fact that some time prior to January 28—between January 1st and that date in June that Mr. Hemmer and Mr. King both met with you and made their position clear that whatever formula was eventually worked out for those men with less than one hundred percent Sandusky Line earnings under the January 10, 1962 agreement, would have to include consideration for a full twelve months in which these men performed service, and in accordance with the Memorandum of Understanding attached to the January 10, 1962 agreement? A. Messrs. King and Hemmer came to Roanoke some time in June, 1966—not prior to this time—and that's when they made—only really raised the question, and I told them that Section 3 applied to the people on the Sandusky District—and this was made clear to everyone during the earlier negotiations, and was also

included in our offer of employment to the people on the former Pennsylvania Railroad.

Q. I see. So that I am perfectly clear, then, Mr. Noell, what you have just told us, you were aware of Montgomery's letter before King and Hemmer came to Roanoke in June of 1966? A. That is right.

Q. And at the time King and Hemmer came here they raised the question? A. They just raised the question.

* * * * *

(51) Q. Prior to October 16, 1964, what steps, if any, did the Norfolk & Western Railway Co. take to get the earnings records from the Pennsylvania Railroad Co. of these employees that we are talking about? A. As far as I know, we did not make any effort to get the earnings prior to October 16, 1964—at least, I have no knowledge of any attempt to get them.

Q. Were you aware prior to October 15, 1964, that many of these men had homes in Sandusky, and had worked for many years primarily in Sandusky? A. I had no firsthand knowledge of any of these men. It could be that some of the Chairmen may have made such a statement, but I have no firsthand information along that line.

* * * * *

Q. It is your testimony here this morning that it was Mr. Yancey who represented the Norfolk & Western Railway Co. in dealings which led to these claims finally being disposed of; is that your position? (52) A. Yes—Mr. Yancey acting in behalf of the Norfolk & Western Railway Co.

* * * * *

DEPOSITION OF FRANK A. JOHNSON.

(Taken on Behalf of the Plaintiffs.)

* * * * *

(15) By Mr. Murray:

Q. Do you know, Mr. Johnson, approximately how many former employees of the Pennsylvania Railroad Company, who were employed as Brakemen and members of the International Brotherhood of Railroad Trainmen elected to come over and take employment with the Norfolk and Western Railway Company? A. I do not know how many Brakemen came over.

Q. Were you aware when you assumed duties with respect to the Sandusky Line in 1965, that there were not sufficient jobs available in Sandusky to furnish employment to all of the employees who elected to take employment with the Norfolk and Western Railway Company? A. Yes.

Q. Did you understand at that time how many men who elected to work in Sandusky were unable to hold jobs there, that is, at the time you assumed duties in 1965, Mr. Johnson? A. I don't think I did.

Q. To your knowledge, Mr. Johnson, what steps were (16) taken before October 16, 1964, by the Norfolk and Western Railway Company to assure that earning records for these men were available from the Pennsylvania Railroad Company, should it be necessary to determine any protective benefits which might become due them under these protective Agreements of 1962? A. I have no knowledge of any arrangements that might have been made.

* * * * *

DEPOSITION OF JOSEPH E. FITZ.

(Called by the Defendant for Cross Examination.)

* * * * *

(14)

CROSS EXAMINATION.

By Mr. Curphey:

Q. Well, I gather from your response, Mr. Fitz, that the amount of work on the Pennsylvania in the Sandusky Yard and on the Sandusky Lines, too, in the year prior to the merger had decreased substantially? A. Your records will bear that out.

* * * * *

(18) Q. Now, were there any of the men who did not so elect and, therefore, remain in the employ of the Pennsylvania? A. Yes, sir.

(19) Q. And can you give me an idea as to approximately how many or the proportion that did not elect, as compared with the number that did? A. I would say the other 450 out of the 500 that we have been talking about, approximately 500.

Q. Did not elect? A. Did not elect.

Q. Did the majority of the men in the Sandusky Lodge elect to go to work for the Norfolk and Western? A. The majority; yes.

Q. Was it an overwhelming majority or a bare majority; can you give me some idea as to the extent of it? A. Well, it was—as a guess, I would say a two to one ratio.

Q. Now, will you explain to me the basic underlying reason why those people elected to go with the Norfolk and Western, and on the other hand, the underlying reason why those that did not elect to go? A. Well, anything I would say would be guess work and supposition on my part. I don't know another man's mind. Each man has their own reason for doing this, but if you want to talk about me in particular—

(20) Q. All right, let's start with you. A. Well, I've got a home here. I've got a family and my wife has strong

family ties, and she would balk at the idea of leaving town.

* * * * *

(60) Q. Well, that's my question, that you understood this was their position at that conference; did you not? A. Well, I can't really say this was a concrete position on their part, because, like I say, Mr. Yancey come in and would keep saying that he didn't have the authority, that he was just sent here with orders to bring these up to date, and there were other people handling these matters, and this is what he gave me to understand, that he just didn't think he had enough authority to handle these things, because this would go to the operating people above him.

Q. Did he indicate to you on that occasion that Norfolk and Western would be willing to dispose of these claims or settle these claims on the basis other than the Sandusky Line earnings? A. Well, I don't really think—whenever I would attempt to discuss the formula or something, the General Chairman would remind me that we were here strictly to get these temporary payments and that was it.

Q. Now, another appeal was taken with regard to (61) this letter of October 25, 1965; is that right? A. An appeal was taken not—not another. We referred to an appeal here in the record. An appeal was taken July 21, 1966—yes; that's right.

Q. That was the date of the hearing? A. That was the date of the hearing; yes.

Q. Am I correct that you took this appeal by means of a letter under date of April 27, 1966? A. Well, I would have to check. I thought the date was April 26; you're probably right.

Q. Very well. It was taken one or the other? A. Yes.

Q. This would be shortly after this conference in Columbus? A. Yes.

Q. And you were appealing from—withdraw that—your appeal related to General Chairman McNeel having entered into this Letter of Understanding of October 25, 1965; is that right? A. That is correct.

Q. So, again, you were—as you previously explained to me, you were objecting to this understanding for temporary payments. You wanted to have the (62) matter finally settled in accordance with the formula that you felt was applicable? A. You're half right.

Q. Very well. Explain the other half to me. A. Under the Constitution of the Brotherhood of Railroad Trainmen, and I might add there is one thing that the Local Chairmans become extremely aware of, as a matter of fact, that is the first thing they become aware of, is time limits.

Under our Constitution we have to be aware of it. Now, the time limit on appeals under Rule 13 is one year.

The Board convenes in January and July. I did not get by the January Board and my last shot at the appeal was the July Board of Appeals, and I appealed because I still felt that the earnings should be over the entire division, and also to protect myself under the Constitution, because I wouldn't have been able to come back and say at some future date that I took exception to this, and then the men could come and say, "Why didn't you appeal?"

This is why I appealed under the rules of the Constitution, and I protected myself in this spot, (63) because the next session of the Board of Appeals would have put me beyond the time limits.

Q. I see. When you use the expression, earnings over the entire division, are you using that as opposed to earnings on the Sandusky Line? A. I am.

Q. As opposed— A. So once again I might repeat myself here, but I think you covered this in one of your previous questions and answers, that the Norfolk and Western's position at this conference on March 31, 1966, was pretty clear in my own mind, that they were going to use a formula based upon the Sandusky Line earnings only, and this was the whole bone of contention, that they couldn't get these earnings segregated, and this was why Jack said the reason for the Letter of Understanding, and I told Jack I understood it, and he told me that in all eventuality we would probably end up with 100 per cent

Toledo earnings anyways, but he was in contact with the Columbus men and there was pressure coming from all directions to get something moving.

Q. During the conference of March 31, 1966, in (64) Columbus, was Implementing Agreement 1-A discussed at all? A. Never.

Q. Never brought up? A. No, because if it had been I would have jumped right through the ceiling right then.

Q. When was the next conference that you attended after March 31, 1966, with regard to these claims? A. Well, I imagine it was in February of 1967.

Q. Was that at Mr. McNeel's office in Columbus? A. No; it wasn't.

Q. Where was it? A. It was in Roanoke.

Q. You went down there with Mr. McNeel, did you? A. We were there. He was there prior to the time I got there.

Q. What was your understanding of the purpose of that conference before you went down there? A. In 1967?

Q. Yes; the second one. A. Well, we were far behind, even under the Letter of Understanding, even on the temporary payments, and it was my impression that we were going to attempt to (65) get these people with no Sandusky Line earnings a formula that would be worked out, and to get them some protection and bring up to date the claims that would show these men had 100 per cent Sandusky earnings.

Q. Of course, it developed otherwise? A. It certainly did. Again we came to this conference where the carrier had already preconceived notions, which they already laid down on the table, you know where this is a situation of either like it or leave it. I'd like to have left it. That's what I would like to do.

Q. Had you had any meetings with General Chairman McNeel during the month or several months preceding this February 20, 1967 conference in Roanoke about the same subject matter? A. No, but let me say this, Mr. Curphey: My monthly settlement meetings were held in Columbus, and Jack McNeel's office is in Columbus, and

I made it a point to see him when I was there, and I would mention this to him when I was in Jack's office, as well as oral conversations, and he assured me, "Joe, we will get your formula worked out and get you the protection under the January 10, 1962 agreement."

(66) This was the understanding we had all the way along.

Q. You are talking about correspondence back and forth concerning this, or conferences called specifically for this? A. No.

Q. And I understand your appeal with regard to the October 25, 1965 Letter of Understanding was denied; is that right? A. It was denied, and I got the message from the Board of Appeals that, "Joe, you are an alarmist. Your men have protection under the January, 1962 agreement, and you don't have a thing to worry about."

Q. Mr. Fitz, back to this conference in Roanoke on February 20, 1967. Did you at any time during that conference take the position that General Chairman McNeel did not have the authority to negotiate on your behalf or on behalf of the Sandusky Line? A. I didn't see any reason to take that position, because General Chairman McNeel was backing my position, saying we will be protected under the January 10, 1962 agreement. He was backing my position.

(67) Q. Did you take the position or advance the argument during this conference that the Implementing Agreement 1-A was not an effective and valid agreement? A. I didn't take that position that it was not an effective and valid agreement, but I was assured by the General Chairman that this agreement was meant to—this came to me after the Board of Appeals' decision, that it was my understanding this was meant to cover the 100 Engineers, and in one case of an employee we have a Grand Lodge officer, and this would be more specifically meant to cover people working out of Columbus, because there didn't seem to be any dispute about their earnings on the Sandusky Line.

* * * * *

(75) Q. And I assume this was discussed in your conference in Roanoke, that is a follow up for this particular period of time? A. It was my understanding at that conference, and it was the General Chairman's position that, "Joe, let's bring this up to date so far as we can under the 75 per cent letter, and some people that had agreed to 100 per cent, they were mostly Columbus people.

* * * * *

(85) Q. Did Mr. McNeel send you a copy of this letter of March 3, 1967? A. He did; that was the impetus that sent me to an attorney, that was the thing that made me see an attorney, because I had tried everything in my power to settle this thing reasonably, and I asked Steve Young, anybody that would bend an ear to me to help, and I got the same advice from all of the people involved, that the I.C.C. has the power invested in them to order the merger, but they do not have the power to police it, and if you have a problem, go see an attorney, so I eventually took their advice.

Q. Did you discuss with Mr. McNeel sending a reply to this letter? A. I may have mentioned it to him in an offhand way, (86) but Jack looked at it and shook his head and said this was ridiculous and that was about the extent of our conversation along those lines, I would expect.

Q. Well, you did not have any discussions about replying to it, I gather? A. Not to my recollection. Like I say, I might have made an offhand comment on it or something like that, but at this point I was convinced there was only one way to resolve this thing properly.

Q. Well, to your knowledge, Mr. McNeel did not, in fact, reply to the letter? A. To the best of my knowledge he didn't.

Q. Then how about the letter of April 3, 1967, with reference to the later period of December, 1965 through September, 1966; do you know whether he replied to that letter? A. I don't know that he directly replied to it. There was—I'm not even sure of that. I can't say. I honestly don't know, Mr. Curphey.

Q. To the best of your knowledge, did Mr. McNeel have the same understanding as a result of this conference as you did? A. Absolutely; even as late as October, 1968, he (87) gave me correspondence to that effect, that our people were entitled to the protection of the January 10, 1962 agreement.

* * * * *

(88) Q. Mr. Fitz, without regard to the problems arising under the Schedule, and without regard to your position with respect to the January 10, 1962 agreement, as set forth in the appended lawsuit, have you stated in writing in any communication where the Norfolk and Western claims were not disposed of as stated by Mr. Yancey? A. No; I don't think so. The reason I say that is because I haven't for the simple reason that it was—there was no doubt that between Jack McNeel and myself that these were not settled, that was our understanding, and that we were not satisfied, and that was just one point.

(89) Now, you have to understand that he is a businessman and he represents probably 10,000 people down there, and he has a big committee and 53 Local Chairmen. Now, you don't go writing letters putting a lot of burden on the Local Chairman. He can't read every one of them.

At one point, as I recall, he did take some exception to one of our former associates here who wanted to engage in a letter writing contest, but he made it quite clear that as a businessman he didn't have the time just to sit down and steadily write letters, but he knew there was no question between us of our respective positions, and you just simply can't over-burden the man by making him answer every letter that comes through.

* * * * *

(99)

DIRECT EXAMINATION.

By Mr. Murray:

* * * * *

Q. Now, perhaps I misunderstood you or didn't hear your answer, but what was the Board of Appeals' position with regard to the Implementing Agreement 1-A as it affected the rights of the men in Lodge 844 with less than 100 per cent Sandusky earnings? A. Well, they told me that this agreement was along with the Letter of Understanding temporary in nature; that it was meant to protect people in Columbus who had been—whose payments had been stopped or forestalled due to the fact that the carrier didn't come up with Sandusky Line earnings, and these people had 100 per cent Sandusky Line earnings, and this was meant to take care of these people, and in one case a gentleman that we have here who is a Grand Lodge officer—

Mr. Curphey: Objection to that response, since it includes hearsay and a conclusion of a witness.

Q. Joe, just try to limit yourself specifically to (100) my question here. Did I understand you correctly that the Board of Appeals took the position that you would be fully protected when a formula was worked out under the January 10, 1962 agreement? A. Yes.

Q. And was that at the appeal in July of 1966? A. It was at the appeal and in their decision; yes.

Q. Did they refer to a specific part, as you recall, either in writing or orally, at that time? A. Yes.

Q. A specific part of the January 10, 1962 agreement, did they? A. Yes.

Q. Which would afford you this protection? A. Yes.

Q. What part of the January 10, 1962 agreement did they refer to you? A. The Memorandum of Understanding attached to and made a part of the January 10, 1962 agreement.

Q. Do I understand you correctly that General Chairman McNeel did put his position on the record to be that

there never had been a settlement of claims of those men with less than 100 per cent Sandusky Line (101) earnings in writing to you, sometime after the conference in Roanoke on February 20, 1967? A. Yes; he did.

Q. Do you recall the date of that letter? A. No.

Q. Approximately? A. I think it was October 10, 1968.

Q. All right, Mr. Fitz, do you know whether or not any of the men with less than 100 per cent Sandusky earnings accepted any payments from the Norfolk and Western Railway Company after February 20, 1967, and I refer you specifically to any men whose names appear on Attachment A, B, or C, shown by Mr. Curphey to you during his Cross Examination of you? A. No; I don't think there have been.

Mr. Murray: I have nothing further at this time.

RE-CROSS EXAMINATION.

By Mr. Curphey:

Q. Mr. Fitz, when you received this letter from Mr. McNeel in January of 1966, in which he referred to the Implementing Agreement 1-A, weren't you curious as to (102) what he was talking about? A. Yes and no. I don't like to confess to being ignorant, Mr. Curphey, but being a new Local Chairman, I was curious but I couldn't see where this thing would have any barring whatsoever on what we were talking about. His letter was clearly in error, because he said I had referred to it, and I didn't even know anything about it up to the time of the Board of Appeals.

Q. And you did not make any inquiry of him as to what he was talking about? A. Not until we got to the Board of Appeals. I had been assured all the way that we were going to be protected under the January 10, 1962 agreement, and I might say that Jack even was a little bit upset with me about appealing, but I explained to Jack that we've got a time limit in the Rules and I have to protect myself and I have to protect these people that I

represent, and this was primarily the reason for the appeal.

I have read more than one appeal and I will say the majority of them have overshot the time limit and (103) I didn't want that to happen, because I didn't want to lose out on the appeal because of that. They are very strict on time limits, and I wanted to follow the rules right down the line.

* * * * *

DEPOSITION OF FRED S. YANCEY.

(Taken on Behalf of Plaintiffs.)

By Mr. Murray:

* * * * *

(30) Q. * * * Now, Mr. Yancey, do I understand it is your position that the claims of these Plaintiffs have been settled? A. Right.

Q. And you are telling us then that someone, some representative of these employees, agreed to settle these claims. Is that your position? A. Yes; with a duly accredited representative.

Q. When? A. When?

Q. Yes; when did a duly accredited representative agree that these Plaintiffs' claims would be finally settled by taking their earnings between the dates represented and stated here as the test period on the Implementing Agreement 1-A, and dividing by 12 and using that figure as to their protective benefits or (31) their average monthly compensation? A. I don't remember the exact date, but here is the letter from the representative.

Q. Is it your answer that you don't remember the exact date? A. Well, we met. We had several conversations and we got together and calculated the figures and went over them together and agreed to it.

Q. I would like to see—do you have anything in writing any place by a duly accredited representative of these employees who agreed, as a final settlement for their claims, that they would be entitled to an average monthly compensation, based upon only the 12 months' earnings on the Sandusky Line divided by 12 as a final settlement of all their claims? A. Here is the letter from their representative.

Q. You are showing me a letter dated October 12, 1966? A. Yes.

Q. And you refer to a letter addressed to Mr. W. A. Noell, and this letter is from Mr. McNeel; am I correct? A. Yes.

* * * * *

(39) Q. Okay now. Using any of the correspondence you have there, I want to ask you the same question that I asked you a moment ago, what, if any, documentation do you have in your possession, or are you aware of, whereby a duly accredited representative of these Plaintiffs agreed to accept as final settlement of these Plaintiffs' claims, any amount or any formula with respect to the average monthly compensation due, arising out of the merger? We are now talking about duly accredited representatives. A. Well, the next settlement was made in our letter of March 3rd—

Q. I'm sorry, Mr. Yancey, I am not trying to confuse you, but my question simply is—

Mr. Curphey: Just a moment. The witness is trying to make sure that he understands your question.

(Discussion off the record.)

By Mr. Murray:

Q. What writings do you have from a representative, a duly accredited representative of these Plaintiffs, indicating that the final settlement of this matter (40) had been made; refer to the date of the letter, if you will, please? A. I don't have a letter from them, but I have a letter that sets out that the agreement was made.

Q. Yes; do you have a letter from them? A. I do not have it right here. They may have written one and may not have written one; I don't know, but we settled this stuff in a conference, as you know—

Q. I'm not trying to cut you off, Mr. Yancey, but I want to know whether you have such a letter here? A. I don't have such a letter here. I don't see one here.

Q. Are you aware of such an agreement in writing from a duly accredited representative which does this, Mr. Yancey? A. Your question is, as opposed to—

Q. I am asking you this question very simply, I said from a duly accredited representative, any writings. A. No doubt we have.

Q. But you don't have it here? A. I don't have it with me; no. I do know that an (41) agreement was made.

Q. Would you be good enough, Mr. Yancey, to furnish us with a copy of such a letter? A. If there is such a letter as that; yes.

Q. I take it then you will be good enough to furnish us with a copy of such a letter, if there is such a letter? A. Yes; if I have it I will certainly give it to you.

Q. You will furnish us a copy, I hope, before the trial on September 15, 1969? A. Yes.

* * * * *

(49) Q. Do I understand your position to be that the final settlement of this matter was made orally with Mr. McNeel?

Mr. Curphey: Objection to that. The witness didn't so testify.

Q. Maybe I misunderstood. I will ask you this then; when do you recall reaching a final settlement with Mr. McNeel concerning this matter? Give me the month, the day, the year as best as you can. A. It was in two letters.

Q. My question is, first of all, when? A. Our March 3rd letter concerning that February 20, 1967 conversation.

Q. So then this would be February what? A. The exact date I don't know, but I believe it was February 20, 1967.

(50) Q. And who was present at that conversation? A. I believe there was Fitz and Mr. Mick, and of course Mr. McNeel.

Q. If I understand your testimony correctly, Mr. McNeel agreed on February 20 to finally settle these claims of these men who are in this lawsuit? A. That's right.

Q. Is that your position? A. You have it set out in—

Q. You can refer to anything you want to use to refresh your recollection.

Mr. Curphey: Let the witness describe it, Mr. Murray, in his own words.

Mr. Murray: While I realize that there is a dispute as to whose witness this is, nevertheless this witness must be responsive to any questions that are asked, and he is not being responsive directly to the question.

If he is more responsive, then I wouldn't interrupt.

A. In our letter of March 3, 1967, we refer to conversation on February 20, 1967, with Mr. McNeel, Mr. (51) Fitz and Mr. Mick of his committee, and we came to the agreement, and it is set out in that letter the amount of money that would be payable for the period October 16, 1964 through November of 1965, and attached to that letter marked A, B, and C, sets out the amounts agreed upon.

Mr. Murray: Now, I will ask that the last part of that answer be stricken as unresponsive.

By Mr. Murray:

Q. So that I understand you then, your answer is that the date would be February 20, 1967? A. That's right.

Mr. Curphey: I oppose your motion to strike for the reason that I think it is responsive, and represents an attempted explanation by the witness to answer your question.

Mr. Murray: The Court can rule on these, but I didn't ask for any elaboration. I just asked him for the date when this conversation and agreement was had, and he told me the date was (52) February 20, 1967, as being the date of the conversation when the agreement was reached.

By Mr. Murray:

Q. At that agreement, do you recall—did Mr. McNeel sit down and sign anything indicating that there had been an agreement? A. No; he didn't sign anything.

Q. That's all; thank you. Did Mr. Fitz sign anything? A. I wasn't there when Mr. Fitz—

Q. The answer is you didn't see him sign anything? A. That's correct.

Q. But you talked it over—I'm just trying to get your position. You talked it over and agreed on that date to finally settle these claims? A. Right; the amount and everything.

Q. The amount and the test period and everything, is that it? A. Yes.

* * * * *

Petition For Writ

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-97

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

RICHARD NEMITZ, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-97

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

RICHARD NEMITZ, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (A. (II) 179-193)[1] is reported at 436 F.2d 841. The opinions of the District Court (A. (I) 19-36; 43-58) are reported at 287 F. Supp. 221 and 309 F. Supp. 575.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1971. The petition for a writ of certiorari was

[1] References in this form are to the printed appendix in this Court. The parenthetical numeral indicates the volume of the appendix in which the material referred to may be found.

filed March 15, 1971 and was granted May 24, 1971. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTE INVOLVED

This case presents a question of first impression in this Court concerning the proper interpretation and effect of the last sentence of Section 5(2)(f) of the Interstate Commerce Act (49 USC § 5(2)(f)). Section 5(2)(f) provides:

> "(f) As a condition of its approval, under this paragraph of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provision of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

QUESTIONS PRESENTED

1. Do the first two sentences of Section 5(2)(f) of the Interstate Commerce Act, dealing with the Interstate Commerce Commission's responsibility for the protection of railroad employees who may be adversely affected by a

railway consolidation, restrict the right of railway labor and management voluntarily to agree, both prior and subsequent to Commission approval of a railway consolidation, on the protection to be afforded such employees where the last sentence of Section 5(2)(f) states that they shall have this right "Notwithstanding any other provision of this Act. . . ."?

2. Where a collective bargaining agreement grants the employee's authorized collective bargaining representative discretion to decide whether or not to exhaust the grievance procedure, is the employee bound by the union's good faith determination that the grievance is without merit, or may the employee ignore the outcome of his union's administrative process and initiate judicial proceedings against the employer with regard to the same grievance?

STATEMENT OF THE CASE

Pre-Merger Negotiations

In 1961, an application was filed with the Interstate Commerce Commission (Commission) for approval of the merger of the Norfolk and Western Railway Company (N & W) with the New York, Chicago & St. Louis Railroad Company (Nickel Plate), the lease by the N & W of the Wabash Railroad Company, and the purchase by the N & W of the Sandusky Line of the Pennsylvania Railroad. Shortly thereafter, the Brotherhood of Railroad Trainmen (BRT) and other railroad labor organizations intervened in opposition to the application and for the purpose of securing protective benefits for adversely affected employees in the event of approval. With respect to protective benefits for employees, alternative approaches were available to the N & W and the intervening labor organizations. One approach would have involved full participation in adversary

proceedings before the Commission on that issue and ultimate submission of the question to the Commission for the prescription of protective conditions in the order approving the merger. An alternative was collective bargaining for the purpose of reaching agreement on protection for employees. The parties chose the latter course.

Prior to Commission approval of the merger, the N & W entered into a voluntary agreement with the Brotherhood of Railroad Trainmen (BRT) and other labor organizations, dated January 10, 1962, for the protection of employees who might be adversely affected by the merger (A. (I) 60-71). The agreement recited that it was made "pursuant to the provisions of the Railway Labor Act, as amended, and in accordance with the last sentence of Section 5(2)(f) of the Interstate Commerce Act . . ." (A. (I) 62). Section 1(d) of the agreement contained a provision for arbitration of disagreements concerning the proper interpretation or application of its provisions. That section provided that if a dispute arose which could not be settled between the BRT and the N & W within thirty days after it arose "the dispute may be referred by either party to an arbitration committee for consideration and determination" (A. (I) 65-66).

The substantive provisions of this agreement were not limited to the type of employee protection which Section 5(2)(f) requires when the Commission imposes conditions in its order of approval. When the protective benefits are prescribed by the Commission, an employee's pre-merger compensation must be protected from adverse effects attributable to the merger for a period of four years from the date of the merger or for the number of years during which the individual was employed prior to merger, whichever is less. There is no guarantee of employment and the protection flows only from the employing carrier.

This agreement of January 10, 1962 provided the basic benefits for the employees of the railroads involved in the transaction. The agreement went beyond the minimum protection of Section 5(2)(f) by providing for lifetime employment guarantee for all existing employees. Further, Section 1(a) made the provisions of the Washington Job Protection Agreement[2] applicable to the employees of all of the carriers involved in the various transactions, *"except as hereafter modified in Section 3"* (A. (I) 63). Section 2 extended the same protection to employees of the Wabash and certain other carriers *"except as provided in Section 3 hereof"* (A. (I) 66).

Section 3 covered employees of the Sandusky Line and provided as follows (A. (I) 67-68):

> "On the effective date of the acquisition by Norfolk & Western of the Sandusky Line presently operated by the Pennsylvania Railroad, approval for which is sought in Finance Docket No. 21512, Norfolk & Western will take into its employment all employees represented by the labor organizations signatory hereto, except those on furlough or leave of absence as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated, who during such period have exercised employment rights on said Sandusky Line and *elect to accept such employment;* provided, however, that in the event two or more employees, including those on leave of absence, have employment rights to the same job, said

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[2] In 1936, most of the nation's railroads and labor organizations representing their employees entered into the Washington Job Protection Agreement. This Agreement, applicable to coordination or mergers of previously separate carrier facilities, affords income protection to adversely affected employees for a period of five years. The Agreement also provides for separation allowances and allowances to cover moving expenses. See *Railway Labor Assoc.* v. *United States,* 339 U.S. 142, 147-48 (1950).

employees will be protected hereunder and their employment preserved only to the extent of their individual equities in said job; and provided further, however, that none of such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment except that *Norfolk & Western shall not be required to provide employment to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition.* In the event any such employee elects not to accept such employment and in lieu thereof exercises employment rights on the Pennsylvania Railroad, Norfolk & Western agrees to offer employment to the employee of the Pennsylvania Railroad ultimately displaced by the return of said employee, who elects to accept such employment. Pennsylvania Railroad employees accepting such employment shall be entitled to all the protective benefits of this Section provided that *Norfolk & Western shall not be required to provide employment or compensation to any such employee during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed by and paid to the Sandusky Line employee, who caused such Pennsylvania Railroad employee to be displaced, in the twelve months' period immediately preceding the effective date of said acquisition.*

• • •

"It is further agreed that Section 1(d) herein, shall be applicable to the provisions contained in this Section" (emphasis added).

As a consequence of the qualifying clauses which appear in Sections 1 and 2 regarding the primacy of Section 3, the protection of employees of the Pennsylvania who elected to become N & W employees when the Sandusky Line was acquired was defined exclusively by the provisions of Section 3.

An examination of Sections 1, 2 and 3 of the January 10 Agreement shows that Pennsylvania employees who elected to become N & W employees on the acquisition date were accorded a type of protection which differed from that applicable to employees of other carriers covered by the Agreement. Employees covered by Sections 1 and 2 are guaranteed compensation equal to their full yearly earnings prior to consummation of merger, while the Pennsylvania employees, who had worked on the Sandusky Line, are guaranteed, by Section 3, compensation equal to their yearly earnings *on the Sandusky Line* prior to consummation of the merger. The reason for this difference is apparent when the nature of the transactions is considered.

In the case of the employees covered by Sections 1 and 2, all the lines of railroad on which these employees worked in previous years became part of the N & W as a result of the merger. The N & W, which had obtained the right to operate these lines, accordingly agreed to assume the burden of mitigating the effect of this acquisition upon the employees of these lines. The employees who worked on the Sandusky Line, however, were employees of the Pennsylvania Railroad for whom the Sandusky Line was only a portion of their working territory (A. (I) 7). These employees also worked on other portions of the Pennsylvania Railroad which were not acquired by the N & W. Operations on the Sandusky Line were manned by employees of the Pennsylvania who had the right to work anywhere on the Toledo Division of the Pennsylvania Road, including the Sandusky Line (A. (I) 7). These employees worked on the Sandusky Line when work was available, but had the right to work elsewhere on the Toledo Division during slack seasons or on other occasions when they chose to exercise their seniority rights for that purpose (A. (I) 7).

When the N & W acquired the Sandusky Line, it thus acquired only a portion of the working territory on which the Sandusky Line employees earned their living and, consequently, it could provide work for only a portion of those employees. The Pennsylvania Railroad, which retained the residue of the Sandusky Line employees' working territory, was in a position to provide work on this portion for the remaining Sandusky Line employees. In order to secure an allocation of employees to each line, consistent with the work opportunities remaining after the sale to N & W, the protection afforded to those electing N & W employment was limited to their Sandusky Line earnings (Noell Deposition, pp. 9, 12-13). It was expected that this limitation would make the N & W employment option attractive only for those with full-time earnings on the Sandusky Line and, thus, would result in an appropriate allocation of employees between the N & W and the Pennsylvania. Had the N & W agreed to protect all earnings on the entire Toledo Division, all Pennsylvania employees on the Toledo Division would have elected to become N & W employees on the Sandusky district.

By resolving the problem of employee protection through a voluntary agreement on this subject prior to Commission approval of the merger, the parties eliminated the necessity for the Commission to prescribe protective benefits for the employees covered by the agreement in its order approving the transaction. Thus, when the Commission approved the acquisition in 1964, its report merely recited the fact that employee representatives and the N & W had entered into an agreement for the protection of employees adversely affected by the transactions covered by its order. As to such employees, the Commission adopted the Examiner's conclusion that:

> "In view of the agreements mentioned, no conditions need be imposed under any authority granted herein

for the protection of those employees covered by such agreements." (324 ICC at 90)

The Commission did prescribe the traditional four-year income protection "for the benefit of employees not covered by such agreements . . ." (324 ICC at 50).[3]

Post-Merger Negotiations

Following approval by the Commission, the various transactions, including the acquisition of the Sandusky Line, were ultimately consummated on October 16, 1964.

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[3] The following is a comparison of the protection afforded Sandusky Line employees under the 1962 agreement and the protection specified by Section 5(2)(f) of the Act governing Commission prescription:

	Section 5(2)(f)	*Agreement*
1. Burden of Proving Loss of Compensation Due to Merger	Burden on Employee	All Employees Deemed Adversely Affected
2. Period of Protection	4 years	Entire Working Lifetime
3. Extent of Protection	Full Earnings	Earnings on Sandusky Line
4. Source of Protection	Prior Employer (Pennsylvania)	N & W
5. Continuing Employment Rights.	Remain Employees of Pennsylvania; Continued Employment Dependent on Seniority and Available Work	Option to Become N & W Employee with Lifetime Employment Guarantee
6. Working Conditions	No Guarantee	Preserves Prior Working Rules

In furtherance of the protection agreement, all of the concerned employees were fully informed of the nature of the protection contained in Section 3 of the 1962 agreement and were required to make written election to become employees of the N & W before they became bound by the provisions of Section 3.[4] Despite this restriction, however, some employees who desired to live in Sandusky but had limited Sandusky Line earnings did make the election, after weighing the relative benefits of the agreement (including lifetime employment with N & W) against the restriction in earnings protection to prior earnings on the Sandusky Line, and perhaps in the hope that business over the Sandusky Line would increase under N & W ownership and operation (Noell Deposition, p. 18).

During the months immediately following the purchase of the Sandusky Line, the N & W and Brotherhood of Railroad Trainmen attempted to compute the protective benefits due the Pennsylvania employees who had elected to become N & W employees under the terms of Section 3 of the January 10, 1962 Agreement. The N & W was unable, however, to obtain from the Pennsylvania Railroad the Sandusky Line earnings of these employees in the twelve months prior to October 16, 1964 (Noell Deposition, p. 20). Although the Pennsylvania did provide data showing total earnings over the entire Toledo Division of the Pennsylvania, it did not furnish a breakdown for wages earned on the Sandusky Line alone (Yancey Deposition, pp. 33-35).

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[4] The affirmative election required of Pennsylvania employees who had worked on the Sandusky Line was emphasized in a notice distributed to such employees under date of September 30, 1964 (A. (I) 153-59). The notice included a form with alternative elections, declining or accepting employment with the N & W. Section 3, quoted above, was attached to the form and was repeatedly emphasized as the source of any protective benefits for Pennsylvania employees electing to work for the N & W (A. (I) 153-59).

Because of the delay in payment of benefits and the other questions which arose subsequent to consummation, the Brotherhood of Railroad Trainmen sought to initiate arbitration under Section 1(d) of the 1962 Agreement in order to fix the rights of the parties under Section 3 (A. (I) 102-06). Before arbitration began, however, the parties reached agreement on these matters and entered into Implementing Agreement 1-A, and a separate letter of understanding, both dated October 25, 1965. The letter of understanding was designed to alleviate the immediate monetary needs of employees entitled to benefits under Section 3, in the absence of and until information was available as to the Sandusky Line earnings of former Pennsylvania Railroad employees. This letter, in relevant part, provided:

> "Thus far we have not received information as to earnings of these employees on the Sandusky Line during the 12 months period immediately preceding the effective date of the acquisition. We are advised that it will be several months before this information can be made available to the Norfolk and Western.
>
> "We are in receipt of a statement of the total earnings during the 12 months prior to October 16, 1964 from employment on the Pennsylvania Railroad of each of the employees who left the employment of the Pennsylvania Railroad and accepted employment with the Norfolk and Western Railway Company October 16, 1964. Copy of that statement is enclosed herewith.
>
> "In order to start making protective allowances which may be due the employees involved under the January 10, 1962 Agreement, we are agreeable to setting up a temporary *'average monthly compensation' for each such employee, which shall be 75% of the total compensation earned by such employee on the Pennsylvania Railroad during the period October 16, 1963 through October 15, 1964, divided by 12.*
>
> • • •

> *"When information as to compensation earned on the Sandusky Line during the 12 months immediately preceding the date of acquisition is available, any underpayments made* for the period October 6, 1964 until the date the correct 'average monthly compensation' figures are available *will be adjusted and any overpayments made during that period will be withheld from the individual's current earnings or monthly displacement allowances, as the case may be,* in installments of $20.00 each month until the total of his overpayment has been withheld" (A. 89-91, emphasis added).

Implementing Agreement 1-A, which was also entered into on October 25, 1965, fully resolved the differences between the Brotherhood of Railroad Trainmen and the N & W with regard to Section 3 (A. (I) 85-88). Implementing Agreement 1-A implemented Section 3 as follows:

> (a) it deemed all former Sandusky Line employees as adversely affected within the meaning of Section 3;
>
> (b) it delineated the 12-month test period prior to the merger as October 16, 1963 through October 15, 1964, rather than some other period, e.g., a calendar-month period (October 1, 1963 through September 30, 1964);
>
> (c) it provided a formula for determining test period compensation for Brotherhood officers for time spent at conventions;
>
> (d) it provided a means for applying the "decline in volume of traffic or revenues" language of paragraph two, Section 3 of the January 10, 1962 Agreement.

With regard to calculating benefits for Sandusky Line employees, Implementing Agreement 1-A stated:

> "(b) For the purposes of Section 1 of the Memorandum of Understanding effective January 10, 1962, relative to construing the above-mentioned agreement for

> Protection of Employees, the 'test period' for employees covered hereby shall be the period October 16, 1963 - October 15, 1964, both dates inclusive. The *'Average Monthly Compensation' for employees covered hereby shall be arrived at by taking the total compensation received by the affected employee for service performed on the former Sandusky Line of Pennsylvania Railroad during the 'test period' and dividing by 12;* except that, if the affected employee comes within the category described in the second sentence of Section 3 of the above-mentioned Agreement for Protection of Employees the total compensation received for service performed on the former Sandusky Line of Pennsylvania Railroad by the Sandusky Line employee who caused the affected employee to be displaced during the 'test period' will be divided by 12 to determine the affected employee's 'average monthly compensation'" (A. (I) 85-86, emphasis added).

Following this disposition of the matter, certain dissident Sandusky Line employees complained to their union officials that the payments provided by the letter of understanding and Implementing Agreement 1-A were less than they had been originally entitled to under the January 10, 1962 Agreement. These employees contended that the 1962 Agreement should be construed to protect their pre-merger earnings over the entire Toledo Division of the Pennsylvania while Implementing Agreement 1-A limited protection to earnings on the Sandusky Line, which was only a portion of the Toledo Division. The BRT officials who were responsible for negotiating these agreements rejected those arguments on the ground that the dissident employees' interpretation of the January 10, 1962 Agreement was incorrect and that Implementing Agreement 1-A was fully consistent with the 1962 Agreement (A. (I) 148-50).

The dissident employees pursued their argument that Implementing Agreement 1-A violated the rights afforded

them by the January 10, 1962 Agreement and were afforded a full hearing before the BRT's National Board of Appeals on this matter. Before the union's Board of Appeals, the employees urged that Implementing Agreement 1-A was void as violative of their rights and that the question of the proper interpretation of the January 10, 1962 Agreement and the validity of Implementing Agreement 1-A should be taken to arbitration by the union pursuant to the provisions of Section 1(d) of the 1962 Agreement. The BRT's National Board of Appeals, its highest appellate body, concluded that the position taken by the dissident employees was without merit since their interpretation of the 1962 Agreement was clearly incorrect (A. (I) 148-50).

Proceedings In The Courts Below

The dissident employees thereupon instituted the present litigation, seeking damages for breach of the 1962 Agreement on the theory that the provisions of that agreement had been incorporated in the Commission's 1964 order approving the merger and that the interpretation of that agreement by their own union constituted a violation of the Commission's order. N & W filed a motion to dismiss this complaint on the ground that the arbitration procedures of the 1962 Agreement or, alternatively, the procedures available under Section 3 of the Railway Labor Act (45 U.S.C. Sec. 153) for resolving disputes over the interpretation of collective bargaining agreements provided exclusive remedies for plaintiffs and barred this action. The district court denied this motion, holding that the employees' unsuccessful request to the union to invoke arbitration was a sufficient exhaustion of the arbitration procedures of the agreement (A. (I) 34). The court further held, on the theory that the suit was not one to enforce a collective bargaining agreement but to enforce the Commission order approving the acquisition of the Sandusky

Line, that the procedures of the Railway Labor Act were inapplicable. This conclusion resulted from the court's view that Section 5(2)(f) both permitted and required the Commission to prescribe protective conditions for employees already covered by a voluntary protective agreement.

Following the denial of its motion to dismiss, N & W moved for summary judgment, relying on Implementing Agreement 1-A which was before the district court for the first time. N & W contended that Implementing Agreement 1-A was the document from which respondents' rights must flow since it represented the most recent agreement between the N & W and the employees' collective bargaining representative on this subject and since it was authorized under the last sentence of Section 5(2)(f). N & W further contended that since Implementing Agreement 1-A was entered into subsequent to Commission approval of the purchase it was independent of any Commission Order and thereby subject to the exclusive arbitration procedures of the agreement or of the Railway Labor Act.

The district court denied this motion (A. (I) 43-58; 309 F. Supp. 575). The court held that the last sentence of 5(2)(f) outlawed agreements subsequent to Commission approval which deviated from the conditions which the parties had originally agreed upon and which, in its view, had been imposed by the Commission. The court further concluded that Section 5(2)(f) also prohibited any agreement which did not provide all employees involved with the benefits which are described in the second sentence of 5(2)(f). Finally, the court concluded that it was authorized to interpret the Commission order, the January 10, 1962 Agreement, Implementing Agreement 1-A and the requirements of the second sentence of 5(2)(f) as they applied to respondents and to determine from this inter-

pretation whether Implementing Agreement 1-A met what, in the court's view, were the requirements for a valid agreement under the last sentence of 5(2)(f) and whether the effect of Implementing Agreement 1-A on the employees involved was "benign". The court concluded that Implementing Agreement 1-A did not meet these requirements and held it void (A. (I) 56).

In the same opinion, the district court resolved the cross-motion for summary judgment which had been filed by the respondents. The court construed the January 10, 1962 Agreement in accordance with respondents' view, thereby rejecting the contrary interpretation of that agreement by the BRT and the N & W, the parties who had negotiated and signed it. The court issued a declaratory order with regard to the meaning of the January 10, 1962 Agreement and ordered the parties to submit the question of the damages due the dissident employees to arbitration under Section 1(d) (A. (I) 58).

On appeal, the Court of Appeals adopted and adhered to the district court's view of the law. The court held that Section 5(2)(f) must be read "as imposing upon the I.C.C. the duty to make provisions for the protection of affected employees" and that "the existence of a prior agreement does not allow the I.C.C. to ignore its statutory duty" (A. (II) 185). The court concluded that "the rights set forth in the 1962 Agreement were incorporated in the 1964 order and for purposes of federal court jurisdiction stem from such order" (A. (II) 186).[5] Implementing Agree-

[5] The Court of Appeals sought to support this conclusion by referring to the N & W's answer in this case and a stipulation filed with the Commission by the parties to the 1962 Agreement (A. (II) 184). The N & W answer and the stipulation relied on by the Court of Appeals do not support the conclusion that the Commission's order prescribed the protective benefits in question. For

ment 1-A, the court held, "abridged rights previously vested in appellees by virtue of the ICC order" and "is contrary to the policy of the Act" (A. (II) 188-89). With respect to arbitration, the court announced that the arbitration clause was permissive, that the dissident employees were not bound by their union's determination that their claims were without merit, and could seek judicial relief since any effort "to proceed with further administrative remedies would be futile" (A. (II) 192).[6] The court below acknowledged that its decision was in conflict with *Bonnot* v. *Congress of Independent Union, Local #14,* 331 F.2d 355 (8th Cir. 1964), regarding the nature of the obligation imposed by the arbitration clause.

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example, the stipulation provided that "should the Interstate Commerce Commission approve the pending applications . . . the provisions of the agreement . . . shall be applied for the protection of the interests of employees of the carriers involved . . ., as required by Section 5(2)(f) of the Interstate Commerce Act and any report and order issued by the Commission . . . may so state" (A. (I) 80). This stipulation thus recognized that the protection flows from the agreement and that the Commission's order may recite this fact. The parties thus stipulated that the agreement, not the Commission's order, provided the protection required by Section 5(2)(f) and that the Commission might properly acknowledge this.

In any event, the court's subject matter jurisdiction depends on the validity of this conclusion, and the admissions of the parties cannot establish it. *King Bridge Co.* v. *Otoe County,* 120 U.S. 225, 226 (1887); *American Fire & Cas. Co.* v. *Finn,* 341 U.S. 6, 17-18 (1951). The admissions relied on by the Court of Appeals also involve conclusions of law which, unlike allegations of fact, are not deemed admitted by the answer. Vom Baur, *Federal Administrative Law* Vol. 1, Sec. 444; *Peters* v. *Hobby,* 349 U.S. 331 (1955); *Cole* v. *Young,* 351 U.S. 536, 551-58 (1956).

[6] The Court of Appeals determined, however, that the question of damages should also be resolved by the district court rather than through arbitration and remanded the case for this purpose (A. (II) 193).

The net result of the decision below is to give the dissident employees the best of both worlds. The major respects in which the protection provided by the agreements exceeds that which would have been prescribed by the Commission remain undisturbed (the opportunity to become N & W employees, lifetime employment guarantee, no need to change residence, compensation guarantee of unlimited duration, etc.). These benefits were negotiated for respondents by the BRT as part of an agreement pursuant to which the compensation guarantee was limited to Sandusky Line earnings. As a result of the decision below, this limitation has been invalidated while the other features of the agreement remain unaffected. The court below has thus rewritten the agreement, contrary to the position of both the union and the railroad, to give to the dissident employees the best of the protection which the Commission is required to prescribe plus the best of the agreement which the BRT negotiated on their behalf in lieu of Commission-prescribed protection.

SUMMARY OF ARGUMENT

1. The basic and pervasive errors of the decisions below involve their allocation of responsibility for employee protection in connection with transactions subject to Section 5(2)(f) of the Interstate Commerce Act. Although the statutory language, legislative history and administrative interpretation clearly support primary reliance on the traditional process of collective bargaining, the lower courts have decided that the basic and fundamental roles should instead be assumed by the judiciary and the Interstate Commerce Commission.

The lower courts justified their departure from traditional labor policy by construing Section 5(2)(f) of the Interstate Commerce Act in a manner which requires the

courts and the Interstate Commerce Commission to oversee the collective bargaining process. Since the results of this interpretation of Section 5(2)(f) are so clearly contrary to established principles and policy, such an interpretation could only be justified if it were clearly required by the statutory language and legislative history. The fact is, however, that the lower courts' interpretation of the statute is clearly contrary to both. The last sentence of Section 5(2)(f) specifically provides that "any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees" may enter into agreements for employee protection, "notwithstanding any other provisions of this Act".

In the context of the statute, the only purpose which this language could possibly serve is to make certain that the provisions of Section 5(2)(f), dealing with the Commission's duty to prescribe protection and the substance of the protection which the Commission may prescribe, do not limit the authority of labor and management to agree on the protection to be afforded affected employees. This interpretation is confirmed by the legislative history of the Section.

The courts below nevertheless concluded that the Interstate Commerce Commission is required to prescribe protection for employees when approving mergers despite the existence of a comprehensive prior agreement between labor and management on this subject. In reaching this holding, which requires the Commission to retroactively evaluate the efforts of the employees' collective bargaining representative, the lower courts rejected the Commission's own view of its authority in the premises.

2. On the basis of this erroneous interpretation of the statute, the lower courts assumed jurisdiction (a) to deter-

mine whether a voluntary post-merger agreement is consistent with Section 5(2)(f) of the Interstate Commerce Act, and (b) to construe a voluntary railway labor agreement, entered into prior to and in contemplation of a railroad merger for the purpose of establishing protective benefits for employees who might be adversely affected.

A. Each of the holdings below reflects the view that the judiciary and the Commission can and should involve themselves in day-to-day labor problems for the purpose of determining whether the outcome of the collective bargaining process meets what the courts and the Commission determine to be in the best interests of the employees. This view is contrary to established labor policy as that policy has been implemented by Congress and the courts and will, if allowed to prevail, have serious adverse effects on the stability of labor relations in the railroad industry.

The decisions below interpose governmental agencies as third parties at the bargaining table with final authority to dictate the conditions of employment regardless of the wishes of labor and management. This imposition of governmental authority decreases both the likelihood that agreements will be reached with a minimum of strife and economic disruption and the likelihood that those affected by the terms of the agreement will be satisfied with the results achieved.

The courts below also failed to recognize that the protection which respondents received through the efforts of their collective bargaining representative was far superior to that which the Commission would have prescribed had the union not sought and achieved a voluntary agreement with N & W. The fact is that what respondents seek here is not the protection that they would have received from the Commission absent a voluntary agreement. Instead,

they seek to retain the benefits obtained for them by their union through voluntary agreement and to obtain additional protection which is neither provided for in the agreement or required by the Act.

B. The courts below construed the initial employee protection agreement in a manner contrary to the construction of that agreement by both of the parties who had negotiated it. On the basis of this construction of the pre-merger agreement, the lower courts invalidated the subsequent agreement, which had been negotiated and executed by the employees' authorized collective bargaining representative, on the ground that in the courts' view the agreement deprived the employees of benefits to which they were entitled.

3. In addition to eliminating the right of the parties to determine working conditions for themselves, the decisions below also permit the courts to interpret the results of the collective bargaining process despite the fact that the parties have agreed upon a grievance procedure designed to insure that such decisions are made by the parties themselves or by arbitrators who have a thorough understanding of the context in which the agreements operate. This Court has on several occasions recognized the importance and desirability of having industrial grievances resolved by expert arbitrators, emphasizing that "A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in a collective bargaining agreement" and that "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed" (*Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582 (1960)). In the area of railway labor relations, Congress has given explicit recognition to the desirability of arbitration of grievances by making arbitration mandatory and prohibiting judicial consideration of griev-

ances. In addition, the Interstate Commerce Commission has consistently prescribed arbitration as the method for resolving disputes concerning the interpretation of protective provisions which it prescribes. The courts below ignored the considered judgment of this Court, Congress, the Interstate Commerce Commission, and railway labor and management in assuming responsibility to interpret the collective bargaining agreements involved here.

The lower courts' decision that respondents here are not bound by their authorized representative's good faith decision not to exhaust the agreed-upon administrative procedure for resolving this dispute is directly contrary to this Court's determination of the same question. In *Vaca* v. *Sipes*, 386 U.S. 171 (1967), this Court specifically held that the need to permit organized labor and management to create an administrative system which promotes union prestige, quickly disposes of frivolous grievances, treats similar complaints consistently, and permits the parties to permanently resolve major problems requires the opposite result.

ARGUMENT

I. THE COURT OF APPEALS' INTERPRETATION OF SECTION 5(2)(f) OF THE INTERSTATE COMMERCE ACT, UPON WHICH JURISDICTION IN THIS CASE IS PREDICATED, ERRONEOUSLY TRANSFERS TO THE COMMISSION AND THE COURTS THE COLLECTIVE BARGAINING RIGHTS AND RESPONSIBILITIES WHICH THE STATUTE ASSIGNS TO THE REPRESENTATIVES OF LABOR AND MANAGEMENT.

In both the district court and the Court of Appeals, N & W argued that respondents' rights were based on the 1962 Agreement and Implementing Agreement 1-A and

that the courts lacked jurisdiction to resolve a dispute over the interpretation of railway labor agreements such as these. Both courts concluded that the present action was one to enforce an order of the Interstate Commerce Commission rather than to enforce a railway labor agreement. The basis of this conclusion is found in two holdings of the Court of Appeals with regard to the proper interpretation of Section 5(2)(f) of the Interstate Commerce Act. First, the court held that the 1962 Agreement was incorporated in the Commission's order granting authority for the merger because despite the "existence of a prior agreement . . . the ICC is required . . . to impose employee protective conditions. . . ." (A. (II) 185). Second, the court held that Implementing Agreement 1-A is void because, in the court's view, "the subsequent agreement abridged rights previously vested in the appellees by virtue of the ICC order" and is "contrary to the policy of the Act as embodied in the second sentence of 5(2)(f)" (A. (II) 188-89). The court thus concluded that, despite the contrary language and legislative history of the last sentence of Section 5(2)(f), the duty of the Interstate Commerce Commission, under the first two sentences of Section 5(2)(f), with regard to protection of railway employees who may be adversely affected by railway mergers, severely restricts the right of labor and management to agree on protection for such employees and to arrive at mutually desirable arrangements which vary from the benefits described in the statute.

The last sentence of Section 5(2)(f) provides:

> "Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

In the context of the statute, the only purpose which this language could possibly serve is to make certain that the provisions of Section 5(2)(f), dealing with the Commission's duty to prescribe protection and the substance of the protection which the Commission may prescribe, do not limit the authority of labor and management to agree on the protection to be afforded affected employees. The propriety of this interpretation is confirmed by the legislative history of the Section.

Despite the language of the statute and its legislative history, the Court of Appeals concluded that (1) a voluntary pre-merger agreement is subject to review by the Commission and must conform to the requirements for prescription of employee protection applicable to the Commission, since the Commission must prescribe employee protection despite the existence of a voluntary, extensive and detailed pre-merger agreement dealing with that subject; and (2) a post-merger voluntary agreement is void unless it is fully consistent with the terms prescribed by the Commission and with the requirements applicable to Commission-prescribed conditions, or unless a Court, retroactively evaluating the agreement, concludes that it does not abrogate what the Court deems to be the employees' rights under previous agreements and Commission orders. Thus, a voluntary agreement prior to Commission approval is relegated to the position of a suggestion to the Commission as to how it should exercise its responsibilities under Section 5(2)(f) and a subsequent agreement is permisssible only if it deals with ministerial questions or grants employees additional benefits without any concessions on their part. As the following discussion will show, this approach to collective bargaining agreements dealing with employee protection is palpably erroneous.

A. Legislative History and Other Expressions Of Congressional Policy.

An analysis of the legislative history of Section 5(2)(f) reveals that Congress intended, by the last sentence of that Section, to insure that Section 5(2)(f) would not be construed to restrict the right of labor and management to determine protective conditions by voluntary agreement. This history reveals that the lower courts, by failing to honor the literal language of the Section, have attributed the very meaning to Section 5(2)(f) which Congress sought to avoid by including the last sentence.

The history of the merger provisions of the Interstate Commerce Act has been discussed by this Court on several occasions. *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 315-321 (1954); *Railway Labor Assn.* v. *United States*, 339 U.S. 142 (1950); *United States* v. *Lowden*, 308 U.S. 225 (1939). These cases show that the genesis of these provisions was the report of the "Committee of Six", composed of three representatives of railroad management and three representatives of railway labor, appointed by President Roosevelt to study the problem of railroad mergers. This Committee recommended that the Interstate Commerce Act be amended to permit railroad mergers pursuant to voluntary agreements by the individual railroads involved, subject to the requirement of approval by the Interstate Commerce Commission. This recommendation contrasted with the previous law which permitted voluntary mergers only in accordance with a prescribed national plan devised by the Interstate Commerce Commission under which very few mergers had been consummated (*Railway Labor Assoc.* v. *United States*, 339 U.S. 142, 146-49 (1950)). It also contrasted with a suggestion by the Interstate Commerce Commission that a law providing for compulsory mergers be adopted. Thus, Section

5 was conceived by railway labor and management as a means of facilitating railroad mergers by permitting such mergers on terms voluntarily agreed upon by the parties rather than imposed by the Interstate Commerce Commission.

One of the most influential individuals in shaping the language of Section 5 of the Act was George M. Harrison, a member of the Committee of Six and head of the Railway Labor Executives Association, which at the time represented over 90 percent of the railway employees. Mr. Harrison testified before the House Committee as the official spokesman for the Committee of Six with regard to a bill sponsored by the Interstate Commerce Commission at a time when the Committee of Six bill was still being drafted and had not yet been introduced.[7] Mr. Harrison first spoke in opposition to the Commission bill, particularly certain provisions which would have authorized the Commission to override voluntary collective bargaining agreements in approving mergers. (Hearings before the House Committee on Interstate and Foreign Commerce on the Omnibus Transportation Bill, 76th Cong., 1st Sess., 215-16 (1939)).

Mr. Harrison then discussed the approach to employee protection which was favored by the Committee of Six, stating (id., pp. 216-17):

> "Now, the existing situation is this: In 1936, in the spring of that year, we made an agreement [Washington Job Protection Agreement] with about 85 percent of the mileage of the country providing a schedule of benefits for workers that might be affected by coordi-

[7] *In Railway Labor Assn.* v. *United States, supra,* 339 U.S. at 149 (fn. 11), in discussing Section 5(2)(f), this Court stated:

> "As this provision was derived from the recommendation of the Committee of Six, the testimony of George M. Harrison, a member of that Committee, throws light upon its meaning."

nations or mergers. That agreement has now been in operation for about 3 years and it has worked out very satisfactorily. It does not provide as much protection as the workers would like to have; but that is a matter that we undoubtedly can work out with the employers, since they now accept the principle that the men are entitled to protection.

"*Well you might very properly ask the question, If we have such an agreement why we want to put anything in the law? Well, the reason for it is that about 15 percent of the mileage of the country refuses to come into the agreement.* You always have the willful minority that will not go along with the general good and so you have got to make those people do what is right, assuming that what has been done is right, and so we propose that this Transportation Board be given the authority to impose and require protection for men who are adversely affected when these changes are made.

"Now, the exact formula of that, of course, I am not here prepared to suggest, but at least *we have solved that problem through collective bargaining, with the management and if we could get all of the roads into the agreement we would not even suggest any protection as a matter of law.*

"Our Railway Labor Executives' Association representing substantially all of the railway workers, have endorsed this report, because they think it is a genuine approach to this problem so far as governmental action can be undertaken. They have not, as yet, taken any specific action on the matter or the extent of the protection that should be sought, if any, other than those prescribed in the collective agreement made by about 85 percent of the mileage of the country during May 1936.

"So, I want to leave that open before this Committee until our group can consider specifically that matter, but generally I think we have solved it through that

agreement, if we can reach the 15 percent of the mileage that has not subscribed to the agreement up to this time." (Emphasis added)

Mr. Harrison, having made the point that imposed protection was only necessary where voluntary agreements have not been reached, went on to discuss the general type of employee protection provision he would favor. In discussing this subject, he clearly indicated that nothing in the new law should impose rigid terms which would prevent the voluntary negotiation of protective conditions that were either more or less favorable to employee interests than the provisions of the Washington Job Protection Agreement (id. pp. 243-44):

"*The Chairman:* Your idea, I take it, would be to continue in substance the existing agreement rather than reach out for more favorable provisions?

"*Harrison:* Well, it would give the Transportation Board a guide as to what it should do and it would impose on the Board the duty of providing those protections.

"Now, as it is generally applicable, I presume the agreement would settle that, because it is generally applicable.

"*It would permit an elastic arrangement whereby should we subsequently revise the agreement, either less or more favorably, then those conditions would be generally applicable. In other words, you would not make a rigid arrangement and at the same time you would provide for protection.*" (Emphasis added)

Certainly there can be no doubt regarding the objectives of the Committee of Six and the interests it represented with respect to employee protection. Labor and management sought legislation which would preserve the flexibility inherent in voluntary agreement as to protection require-

ments while, at the same time, providing a means by which the Commission could require protection from carriers who were unwilling to make such agreements.

The House Committee ultimately reported out the Committee of Six bill with a favorable recommendation. As the spokesman for the Committee of Six had urged, the bill provided that the Commission, as a prerequisite to approval of a merger, shall require a fair and equitable arrangement for the protection of employees. It was assumed that under this general provision the Commission would adopt the provisions of the Washington Job Protection Agreement as the "fair and equitable arrangement" described in the statute (id. p. 1291). In this manner, the substantive terms of employee protection would evolve from the process of collective bargaining as embodied in that agreement, a goal which Mr. Harrison had repeatedly stressed in his testimony before the Congressional Committees.

The only labor opposition to this approach came from the Brotherhood of Railroad Trainmen, which was not a member of RLEA at that time. Spokesmen for that organization insisted, in testimony before the House Committee, that more precise standards should govern the Commission in its prescription of protective conditions for employees (id. p. 1291). Although this view was not adopted by the House Committee, Representative Harrington successfully sought to achieve this purpose on the House floor by amending the employee protective provision of the House bill to include the following proviso (84 Cong. Rec. Pt. 9, 9882 (1939)):

> "Provided, however, that no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees."

The bill went to conference with the Harrington Amendment. While in conference, much opposition to the Harrington Amendment arose. Recognizing that the Harrington Amendment removed any possibility that the new bill would promote mergers, the conference committee eliminated from the bill all amendments to the merger Section of the Act. When the bill reached the House floor again, however, Congressman Harrington and others proposed to recommit the bill to conference with instructions to reinclude the merger provisions in the bill and to insist upon the following provision for employee protection (86 Cong. Rec. Pt. 6, 5886 (1940)):

> "As a prerequisite to its approval of any consolidation, merger, purchase, lease operating contract, or acquisition of control, or any contract, agreement, or combination mentioned in this section in respect to carrier by railroad subject to the provisions of part I, and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order, or certificate, granting approval or authorization of any transaction referred to in this paragraph, the Commission shall include terms and conditions providing that such transaction will not result in employees of said carrier or carriers being in worse position with respect to their employment.
>
> "Notwithstanding any other provision of this Act, agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

This provision relating to employee protection was intended to accomplish the BRT purpose to impose specific standards governing the Commission in its prescription of

protective conditions and to provide also for the alternative of voluntary agreement regarding such conditions, the objective of the Committee of Six. The final sentence of Section 5(2)(f), encompassing the alternative collective bargaining approach to employee protection, thus appeared for the first time in the motion to recommit. Predictably, Congressman Harrington was the chief proponent of the motion to recommit. In his principal speech on this subject he explained the provisions which he sought to instruct the House conferees to insist upon in conference, stating (86 Cong. Rec. Pt. 6, 5871 (1940)):

> *"The proposed labor clause sets up specific legislative standards for the Interstate Commerce Commission to follow,* instead of permitting the Commission to exercise a free and easy discretion as to what is in the public interest. By the adoption of this provision in the transportation bill, the Government refrains from becoming a party to a program that inevitably means the destruction of many jobs for railroad workers. *But this provision also contains a clause that permits the industry, through the processes of collective bargaining, to work out its problems in a democratic manner."* (Emphasis added)

Thus, the strongest Congressional advocate of compulsory employee protection clearly expressed his view that the language provided legislative standards for the Interstate Commerce Commission to follow, but only where the parties did not resolve employee protection problems through a collective bargaining agreement.

The motion to recommit was passed and the bill was sent back to conference. The conference committee then reported out Section 5(2)(f) in its present form. The section was identical to the House recommendation on recommitment except that it placed a four-year time limit on the protection which the Commission was required to prescribe

in the absence of an Agreement. The last sentence remained in the Section without change.

When the revised bill was returned to the House, the principal speaker in support of it was Congressman Wolverton, who was a member of the House committee which had originally held hearings on the bill and also a House conferee on the legislation. In discussing the differences between the House committee members who had reported out the original Committee of Six bill and the Congressmen who had supported the original Harrington Amendment, Congressman Wolverton stated (86 Cong. Rec. Pt. 9, 10189 (1940)):

> "Now, as to the Harrington amendment, the conferees have adopted practically the same language as originally adopted by the House, but with a modification as to the length of time the provisions are to be effective. This amendment, as you are all possibly aware, was not in the Senate bill in any form whatsoever. Objection was made that the amendment, in the language adopted by the House, would guarantee for life the employment of any and all employees of railroads participating in a consolidation or merger of their lines even though the employee's service may have been as little as a month, or even less; and, furthermore, if there was no work for them as a result of the consolidation or merger, yet their compensation would continue upon the same basis as at the time of consolidation and until death or their voluntary separation from the service of the company.
>
> "In fact there were some who were of the opinion that it froze every job for the employee in service at the time of consolidation but also froze perpetually every job which existed at the time of the consolidation or merger. So, even death or resignation of the employee did not end the job. It would descend to someone else even though not in the employ of the railroad at the time of the consolidation or merger. And,

then *there was also further uncertainty in the opinion of some representatives of railroad labor as to whether the language of the amendment might not preclude voluntary agreements, between management and men by collective bargaining, from being entered into.*

"I want, however, to make it clear that no one who expressed the opinions I have mentioned thought for a moment that any of these possibilities were ever intended by the sponsors of the amendment.

* * *

". . . Thus, it will be seen that there has been no difference in thought and desire between the committee and the sponsors of the Harrington amendment. In fact the provision contained in the original bill had the approval of 20 out of the 21 railroad brotherhoods. And, it is significant in this connection that the one brotherhood which did not agree to our language had never asked for anything other than that the entire consolidation be left out of the bill and the matter be left at this time as a matter for collective bargaining." (Emphasis added)

This language fixes beyond doubt both the genesis and purpose of the last sentence of Section 5(2)(f). It represents an addition to the Harrington Amendment, added to allay the fears of union leaders who supported the Committee of Six bill and who felt that the Harrington Amendment might be construed to preclude voluntary agreement on employee protection. As such, its purpose was to insure that nothing in Section 5(2)(f) or in any other provision of the Act would operate to impair such agreements.

In summary, the legislative history of the merger Section of the Interstate Commerce Act reveals that the principal spokesman for every group that was active in the drafting and planning of Section 5(2)(f) was on record as opposing a provision for employee protection which would provide for rigid government-dictated protection in every merger,

and would preclude voluntary agreement between carriers and railway unions on protective benefits. The legislative history also shows that the last sentence of Section 5(2)(f) was specifically designed to insure that Section 5(2)(f) would not be construed to limit voluntary agreement on protective benefits.

In the face of this overwhelming evidence of the purpose and meaning of Section 5(2)(f), the courts below construed that Section to severely limit the ability of unions and carriers to make effective agreements with regard to employee protection and to require the Interstate Commerce Commission to impose protective conditions in every merger in accordance with the rigid standards of Section 5(2)(f). The lower courts achieved this result by ignoring the literal language of the last sentence of Section 5(2)(f) and without any discussion of the pertinent legislative history. As a consequence of this failure to consider or discuss the pertinent legislative history, the decisions below attribute a meaning to Section 5(2)(f) which requires the very result which Congress clearly intended to prohibit.

It is clear, therefore, that the decisions below will frustrate congressional policy regarding the proper role of collective bargaining in rail unifications. The decision forces labor and management to act as adversaries before the Commission, even though they are agreed on employee protection, because of the possibility the Commission will alter such protection and discourages unions from entering into voluntary agreements either before or after mergers because of the possibility of retrospective criticism when the Commission or a Court reviews the agreement. The decision below would also frustrate voluntary agreements because the unions would be barred from making any concessions as to some aspects of protection in order to achieve goals desired by the employees in other areas.

The Court of Appeals' interpretation of Section 5(2)(f) is also in conflict with fundamental congressional policy in the area of railway labor relations, as evidenced by the basic purpose and provisions of the Railway Labor Act. As this Court has held, the governing purpose of the Railway Labor Act is to promote "the efficient discharge by the carriers of their important functions with a minimum disruption from labor strife". *International Machinists* v. *Street*, 367 U.S. 740, 755 (1961). In *Street*, this Court made it clear that the Railway Labor Act constituted a basic congressional decision that the goal of stable railway labor relations could best be achieved by promoting voluntary agreement in contrast to imposition of employment conditions by government fiat (367 U.S. at 760). Summarizing federal railway labor policy, this Court stated (367 U.S. at 757-58):

> "Congress has . . . consistently adhered to a regulatory policy which places the responsibility squarely upon the carriers and the unions mutually to work out settlements of all aspects of the labor relationship."

Last term, this Court took occasion to emphasize again the congressional purpose in railway labor matters to leave the formulation of substantive employment conditions to the traditional collective bargaining process. Thus, in *Chicago & N.W.R.Co.* v. *Transportation Union*, ___ U.S. ___ (decided June 1, 1971), this Court defined the bargaining obligations of the parties under Section 2, First, of the Railway Labor Act with particular regard to "the strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements" (Slip Opinion, fn. 11, pp. 8-9).

This emphasis on voluntary agreement has been the keynote of all federal regulation of labor relations. In *Team-*

sters Union v. *Oliver,* 358 U.S. 283, 295 (1959) for example, this Court stated:

> "The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Act, is the promotion of collective bargaining to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations and thereby to minimize industrial strife. Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed."

The Court of Appeals has concluded, however, that Congress, in enacting Section 5(2)(f), intended to place severe restrictions on the ability of labor and management to enter into voluntary agreements in merger situations and to vest in the Interstate Commerce Commission and the Courts the duty of supervising the outcome of the collective bargaining process. The language of Section 5(2)(f), particularly when considered in light of its enactment shortly after the 1934 revision of the Railway Labor Act and that it was the result of the same process of compromise between labor and management which led to enactment of the Railway Labor Act, demonstrates that the conclusion of the Court of Appeals that Section 5(2)(f) restricts voluntary agreement is clearly in error.

B. The Consistent And Long-standing Administrative Interpretation of Section 5(2)(f) Of The Interstate Commerce Act.

In a long line of opinions, the Interstate Commerce Commission has consistently expressed the view that, under the Act, a voluntary agreement for the protection of railroad employees, made prior to its approval of a merger, removes the necessity for and authority of the Commission to pre-

scribe protective conditions. In *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 ICC 475, 544 (1966), the Commission stated:

> "The last sentence of Section 5(2)(f) of the act provides that, notwithstanding any other provisions of the act, employee protection may be established by agreement between a railroad and the unions representing its employees. Consequently, except to find, as we do, that the agreement of May 20, 1964 does not render the proposed transaction inconsistent with the public interest, we can make no requirement as to the protection of employees covered by the agreement."

In *Great Northern Pac. & B. Lines Merger—Great Northern*, 331 ICC 228, 279 (1967), the Commission, in speaking of voluntary protective agreements, stated:

> "Under the terms of the last sentence of Section 5(2)(f), the entering into such agreements takes from us the obligation of providing protection for employees covered thereby. As to them, therefore, we make no requirement for protection, but do find the agreement does not render the proposed transaction inconsistent with the public interest."

Accord: *Chicago & N. W. Ry. Co. Purchase, Minneapolis & St. L. Ry. Co.*, 312 ICC 285, 296 (1960), *Duluth, S.S. & A.R. Co. Merger*, 312 ICC 341, 356-57 (1960); *Norfolk & Western Railway Co. Merger, Etc., Virginian Railway Co.*, 307 ICC 401, 439 (1959).

Indeed, in the very merger which is involved in this case, the Commission expressly adopted (324 ICC at 9) the Examiner's conclusion that (324 ICC at 90):

> "In view of the [1962] agreements mentioned no conditions need be imposed under any authority granted herein for the protection of those employees covered by such agreements."

This administrative construction of the statute is entitled to controlling weight. As this Court held in *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965):

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *Unemployment Comm'n.* v. *Aragon*, 329 U.S. 143, 153."

Red Lion Broadcasting Co. v. *F.C.C.*, 395 U.S. 367, 381 (1969) ("the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *."). *Lewis* v. *Martin*, 397 U.S. 552, 559 (1970); *Rosado* v. *Wyman*, 397 U.S. 397, 414 (1970); *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969); *Zemel* v. *Rusk*, 381 U.S. 1, 11-12 (1965); *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 549 (1940); *Gulf Oil Corp.* v. *Hickel*, 435 F.2d 440, 444-445 (D.C. Cir. 1970); *Board* v. *Hearst Publications*, 322 U.S. 111, 130-131 (1944); *Levison* v. *Spector Motor Co.*, 330 U.S. 649, 662 (1947); *ICC* v. *Memphis Union Station*, 360 F.2d 44, 50 (6th Cir. 1966), cert. den. 385 U.S. 830 (1966).

To conclude this point, it is clear that the lower courts erred in holding that Section 5(2)(f) requires the Commission to prescribe protective conditions where the parties to a transaction have entered into a voluntary agreement for employee protection. Since this erroneous conclusion was the predicate for the jurisdictional determination that respondents' rights derive from an order of the Commis-

sion, the decision below should be reversed with directions to dismiss for lack of jurisdiction.

II. THE HOLDING OF THE COURTS BELOW THAT IMPLEMENTING AGREEMENT 1-A IS VOID AND UNENFORCEABLE IS CLEARLY ERRONEOUS.

As shown in the statement of the case, the Brotherhood of Railroad Trainmen, as the authorized representative of respondents and other N & W employees, entered into Implementing Agreement 1-A on October 25, 1965, more than a year after Commission approval of the purchase of the Sandusky Line. It is undisputed that Implementing Agreement 1-A establishes a formula for computing the benefits to which Sandusky Line employees are entitled, based on the Sandusky Line earnings of such employees in the year prior to the acquisition. In this regard, the Agreement states:

> "The 'Average Monthly Compensation' for employees covered hereby shall be arrived at by taking the total *compensation received* by the affected employee *for service performed on the former Sandusky Line* of Pennsylvania Railroad during the 'test period' and dividing by 12 . . ." (A. (I) 85-86).

Because Implementing Agreement 1-A clearly establishes that respondents are not entitled to the benefits they seek in this action, respondents were forced to argue in the lower courts that, although the agreement was entered into on their behalf by their authorized collective bargaining representatives as a means of resolving all disputes with regard to the meaning of Section 3 of the January 10, 1962 Agreement, they are free to ignore it and to proceed as though it did not exist.

The lower courts, in accepting respondents' argument in this regard, concluded that the last sentence of Section

5(2)(f) does not permit the parties to reach agreements subsequent to Commission approval which deviate from the conditions which the parties had originally agreed upon and which, in the courts' view, had been imposed by the Commission. The courts below further concluded that Section 5(2)(f) also prohibits any agreement which provides employees with benefits that the court determines to be less desirable than those described in the second sentence of Section 5(2)(f). Pursuant to these conclusions, the courts below undertook to interpret the January 10, 1962 Agreement, Implementing Agreement 1-A and the requirements of the second sentence of Section 5(2)(f) as they applied to respondents to determine whether Implementing Agreement 1-A "abridged" or "abrogated" any of the protective benefits of the 1962 agreement and whether the agreement met what the courts regarded as the requirements for a valid agreement under the last sentence of Section 5(2)(f). The lower courts concluded that Implementing Agreement 1-A did not meet these requirements and consequently declared it to be void (A. (I) 54-56, (II) 188-89). These conclusions are clearly contrary to the statute.

A. Implementing Agreement 1-A Is Fully Consistent With The Policy And Provisions Of Section 5(2)(f) Of The Interstate Commerce Act.

As the preceding legislative history shows, the provisions of Section 5(2)(f) relating to voluntary protection agreements were intended to permit labor and management to arrive at mutually desirable arrangements which might depart from the protection described in the statute. Any notion of a limitation on what labor and management might agree to, based on the protection features contained in the first two sentences of Section 5(2)(f), is clearly contrary to the basic intent and purpose revealed by the legislative history. The Court of Appeals nevertheless applied pre-

cisely such a standard. The court held that the agreement provides the Sandusky Line employees with less protection than they would be afforded under the provisions of the second sentence of Section 5(2)(f) and is, consequently, "contrary to the policy of the Act" (A. (II) 188-89).

The court's conclusion in this regard was based on the view that the second sentence of Section 5(2)(f) required, as a minimum, that the Sandusky Line employees be given full protection against any reductions in earnings below the employees' total earnings on the entire Toledo Division prior to the merger. The court reasoned that, since the agreement only protected earnings on the Sandusky Line, it provided less protection than was required by the second sentence of Section 5(2)(f). In reaching this conclusion, the court ignored the fact that Section 5(2)(f) provides a four-year limitation on compensation protection, ignored the major additional benefits with respect to matters other than compensation which the employees were entitled to under the agreement, and ignored the fact that the compensation protection afforded by the second sentence of Section 5(2)(f) extends only to reductions in earnings directly attributable to the merger.

The second sentence of Section 5(2)(f) provides only that the Commission shall protect an employee's compensation from adverse effects attributable to the merger for a period of four years from the date of the merger or for the number of years during which the employee has been employed by the carrier prior to the merger, whichever is less. Several points should be borne in mind with regard to this protection. First, in order to obtain any benefits under such protection, an employee has the burden of proving that any loss of compensation which he suffers is a result of the merger and not some other factor. Second, the protection does not guarantee the employee continued employment but only that he will not suffer a loss in com-

pensation for a fixed period of time. Third, the protection flows only from the carrier by which the employee was employed prior to the transaction. Fourth, there is no guarantee that the employee will be subject to the same working conditions after the transaction as before. Fifth, the protection continues for a period of four years or less.

These features may be compared with the protection afforded by the agreements. First, under these agreements, all employees of the Sandusky Line are deemed adversely affected by the transaction with no necessity of proof of this fact. Second, the employee is guaranteed continued *employment* for his entire working life. Third, the employee has the opportunity to become employed by the Norfolk and Western and thereby to continue his residence in Sandusky, Ohio if he so wishes. Fourth, the Norfolk and Western agrees to take over and assume all contracts, schedules and agreements having application on said Sandusky Line between the Pennsylvania Railroad and the employee's labor organizations concerning rates of pay, rules and working conditions with certain minor exceptions. Fifth, both the employment and compensation protection of the agreements continue for the working lifetime of the employee.

Even when the compensation protection afforded by the agreements and protection of all earnings over the Toledo Division during the four year statutory period are compared, without considering other elements of protection, the protection provided by the agreements is preferable. While the formula fixed by the agreements protects less earnings during the four years immediately following the merger, it continues to offer protection beyond the four year statutory period for the full working life of the employee.

The Court of Appeals' view that all Sandusky Line employees would, under Section 5(2)(f), be entitled to compensation for any loss of earnings *attributable to their inability to work on the entire Toledo Division* was based on its conclusion that: "The merger split their seniority district and, as a result, they were unable to receive the working time previously obtainable before the merger—no matter which option they chose" (A. (II) 189). This statement demonstrates a fundamental misunderstanding of the effect of the transaction and the significance of the individual employee's choice to either elect employment with the N & W or remain with the Pennsylvania. Since the work previously available on the Toledo Division was not reduced by its severance into two sections and since the severance did not increase the number of employees, splitting the seniority district would not have reduced earning opportunities if accompanied by an appropriate allocation of employees to each segment of the severed district. For the purpose of achieving an appropriate balance, the parties to the agreements limited protection for those electing N & W employment to their Sandusky Line earnings, expecting that this limitation would make the N & W employment option attractive only for those with full-time earnings on the Sandusky Line (Noell Dep., pp. 9-13). Despite this restriction, some employees with limited Sandusky Line earnings did elect employment with the N & W, apparently anticipating an increase in business over the Sandusky Line under N & W ownership (Noell Dep., p. 18). This decision to accept employment with the N & W despite the fact that their earnings on the Sandusky Line prior to the merger were very limited was the major cause of these employees' loss of earnings. Such employees were not entitled to any protection under any provisions of Section 5(2)(f) since their reduced earnings were attributable to their

election to become N & W employees and were not caused by the merger.[8]

The district court had reached the same conclusion as the Court of Appeals with regard to the necessity for the protection of all losses in earnings of Sandusky Line employees *attributable to their inability to work on the other portions of the Toledo Division.* The district court's conclusion was based on an analogy between the Sandusky Line transaction and a hypothetical transaction in which Pennsylvania was merged into the N & W and all the lines of the Toledo Division, with the exception of the Sandusky Line, were subsequently abandoned. The court reasoned that in the hypothetical transaction the employees' benefits would be calculated on the basis of their entire earnings on the Toledo Division and that, consequently, Section 5(2)(f) must require the same protection in the instant situation (A. (I) 51-52).

The court's analogy is clearly improper, however, since the hypothetical involves a situation where the transaction itself deprives all employees of their right to work on the portions of the Toledo Division other than the Sandusky Line. Thus the hypothetical transaction itself would inevitably create a condition of underemployment by substantially reducing the available work without decreasing the number of employees available to perform the work.

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[8] This is vividly illustrated by the situation regarding respondent Nemitz. During the 12 months prior to merger, respondent Nemitz had total earnings of $7,000 (A. (I) 11). Of this total, only $2,346 represented earnings on the Sandusky Line, the remaining $4,654 having accrued from service on other portions of the Toledo Division (A. (I) 11; Respondents' Brief In Opposition, pp. 3-4). Of the 96 trainmen who elected employment with the N & W, however, 45 worked exclusively on the Sandusky District in the 12 months prior to merger and thus had protection for all of their earnings (Def. Ex. 2, Noell Dep.).

The instant transaction, in and of itself, did not cause a situation of underemployment. To the extent underemployment took place, it was the direct consequence of the respondents' own election to become N & W employees despite their limited previous earnings on the Sandusky Line.

In negotiating the 1962 agreement the parties attempted to maintain full employment opportunities for all Toledo Division employees and to provide certain of these employees with the opportunity to continue to work on the Sandusky Line. Neither of these possibilities were available to the employees under the protection traditionally prescribed by the Commission pursuant to the second sentence of Section 5(2)(f), but were achievable through the flexibility afforded to the parties by the last sentence of that section. The lower court's failure to comprehend the factors which led the parties to reach this agreement illustrates the dangers inherent in the court's assumption of authority to supervise the collective bargaining process. Moreover, the fact that the court's holding would outlaw future agreements which, like the 1962 agreement, deviate from traditional protection in order to meet the needs of special situations, demonstrates the undesirability of this holding.

In any event, a discussion of whether the agreements are consistent with the protective requirements of Section 5(2)(f) misses the point. The possibility of providing protection through voluntary agreement is an alternative to Commission prescription of protection in accordance with those requirements. Respondents' authorized representatives chose that alternative. Respondents, by this action, do not attack this decision to forego Commission prescription in favor of negotiation and voluntary agreements, nor do they seek the type of protection the Commission customarily prescribes in such a situation in the absence

of agreement.[9] Instead, they seek to retain the benefits obtained by their representative through negotiation and voluntary agreement, while using the protection requirements applicable to the Commission to shield them from the effect of the portions of the agreements with which they are not pleased. Respondents' position in this regard, adopted by the courts below, that they are entitled, under the Interstate Commerce Act, to the best of both worlds—i.e., employment with the N & W, lifetime financial benefits and lifetime employment security plus a guarantee of full protection of all previous earnings—is clearly erroneous.

B. Implementing Agreement 1-A Does Not "Abridge" Any Rights Previously Vested In Respondents And Is In Any Event An Agreement Within The Purview Of The Last Sentence of Section 5(2)(f) Of The Interstate Commerce Act.

The decisions below with respect to Implementing Agreement 1-A are clearly based on the premise that the 1962 agreement protected earnings derived from the entire Toledo Division and that Implementing Agreement 1-A "abrogated" this guarantee (A. (II) 188-89). Thus, the Court of Appeals stated:

> "We construe the 1962 agreement as incorporated in the I.C.C. order as meaning that the appellees were to

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[9] This type of protection is illustrated by the Commission's decision in *Cadillac & Lake City Ry. Co. Acquisition and Operation*, 320 ICC 617 (1964). In that case, the Cadillac & Lake City Ry. Co. acquired a line of railroad which had previously been operated by the Pennsylvania Railroad between Falmouth and Missaukee, Michigan. There was no voluntary agreement for employee protection and the Commission prescribed the customary protective conditions for the affected Pennsylvania employees. Under these conditions, the affected employees remained employed by the Pennsylvania with earnings protection for a period of four years from the date of any adverse effect. The conditions also provide reimbursement for some of the costs of moving for employees required to work at a different location as a result of the sale.

> suffer no loss of compensation based upon their inability to work throughout the entire Toledo Division —not limited to their earnings on the Sandusky Line alone." (A. (II) 181)

However, the parties to the 1962 agreement, who negotiated Implementing Agreement 1-A, considered the latter agreement to be wholly consistent with, and in fact required by, the provisions of the 1962 agreement. This is fully and indisputably established by the record of proceedings before the BRT's Grand Lodge Board of Appeals in connection with respondents' efforts to convince the Brotherhood that Implementing Agreement 1-A accorded them less protection than the provisions of the 1962 agreement.

In the proceedings before the Board, respondents were represented by T. E. Fitz, Local Chairman of the BRT Lodge comprised of Sandusky Line employees, and one of the respondents here. The Board posed the issues presented by quoting first from a letter, written by Fitz. In this letter, Fitz asserted that J. F. McNeel, General Chairman of the BRT, acted improperly in agreeing to Implementing Agreement 1-A and a concurrent Letter of Understanding because both documents limit the protection of Sandusky Line employees to their earnings on that line in the twelve months immediately prior to the merger. Fitz also acknowledged in this letter that N & W had taken this same position in a communication to the representatives of the Brotherhood at the time that the 1962 agreement was signed. In outlining his disagreement with the N & W and J. F. McNeel, Fitz stated (A. (I) 116-17):

> "The management of the N & W, however, contend they are only obligated to protect these men for monies earned performing service on the 111 miles of road between Columbus and Sandusky and the Sandusky yards, thereby dividing their earnings for the purpose of establishing a test period. They also contend they

are only required to use earnings from October, 1963, until October, 1964. I have, to the best of my ability, dissected word for word Section 3 of Finance Docket 21512 (Exhibit B) and I fail to see what the carrier is using to support their position. Brother McNeel uses as support of his position a letter from Mr. H. C. Wyatt, Senior Vice President, N & W Railroad, addressed to Brother F. C. Montgomery, Vice President, Brotherhood of Railroad Trainmen, under date of April 23, 1962 (Exhibit C) which states on page 3, Title VIII, Section 3, second paragraph, '* * * The protection afforded these employees of the PRR would be in direct ratio to service on the district in the previous 12 months * * *' It is Brother McNeel's contention, because there was no exception to this language, he was forced to accept the N & W's position, holding only earnings paid these trainmen in the previous 12 months on the Sandusky Branch could be used in establishing a test period, this in a letter addressed to me under date of January 24, 1966 (Exhibit D)."

The Board of Appeals also quoted a letter to Fitz from McNeel explaining why McNeel agreed to the formula for computing benefits outlined in Implementing Agreement 1-A. That letter from McNeel states (A. (I) 129-30):

"In your second letter, you dwell on the language of an Agreement known as Implementing Agreement 1-A. You took exception to the fact that Paragraph B of this Agreement stipulates that the so-called 'test period' was arrived by taking the total earnings of the now Sandusky District men that were actually earned by them while employed on the Sandusky Branch of the P.R.R. Company in the twelve prior months to October 16, 1964, which I feel is proper under Section 3 of the January 10, 1962 Agreement. For support of my position, I have repeatedly quoted the language of this section of the January 10, 1962, Agreement as well as the language of the Memorandum of Understanding attached to and made a part of the January 10, 1962, Agreement. For further support, there is a letter dated April 23, 1962, from Mr. H. C. Wyatt to Vice President

> F. C. Montgomery wherein Mr. Wyatt clearly spells out the test period will be arrived at as it was in our Agreement of October 25, 1965. Mr. Wyatt's language [was] unchallenged or refuted in any way, . . .
>
> "Therefore, in answer to both of your letters of January 13, 1966, I must again assert that my interpretation of Section 3 of the January 10, 1962, Agreement has been arrived at by long study and by advice from the men who handled this matter before I was required to come in contact with it."

Thus, McNeel, who negotiated Implementing Agreement 1-A as the representative of respondents and other employees, clearly stated his view that that agreement fixing the protective benefits based on Sandusky Line earnings in the previous twelve months was required by Section 3 of the 1962 agreement.

The Board of Appeals, after outlining Fitz' position, next outlined the opposing position by quoting a letter submitted by McNeel. This letter states (A. (I) 134, 136-37):

> "Your attention is directed to Section 3 of this Agreement which refers to the trainmen of the Sandusky District of the Scioto Division of the Norfolk and Western Railway Company and reads as follows:
>
> [Quotation of Section 3 omitted]
>
> "From the language in this Agreement, it can be clearly adduced that the trainmen who formerly worked on the Pennsylvania Railroad and exercised their option to transfer to the Norfolk and Western Railway Company are entitled, for the purpose of determining the amount of 'Certified Test Period Earnings,' only to the amount of monies earned on the Sandusky District during the twelve (12) months immediately preceding the effective date of the merger . . ."

Thus, the issues were clearly framed. Fitz took the position that the Letter of Understanding and Implementing

Agreement 1-A were improper because they provided benefits based on Sandusky Line earnings during the previous twelve months and this was contrary to the January 10, 1962 Agreement. McNeel's position, and that previously expressed by the N & W, was that the Letter of Understanding and Implementing Agreement 1-A were proper because they were consistent with the January 10, 1962 Agreement since all the agreements provided for protection limited to Sandusky Line earnings during the twelve months immediately preceding the merger.

The Board of Appeals resolved this conflict with the following unequivocal language (A. (I) 147-50):

> "The Board has carefully considered all the documentary evidence submitted to us for our study as well as the transcript of the oral testimony taken at the time of hearing and we are of the following opinion:
>
> * * *
>
> "Section 3 of title VIII of the 'Agreement Effective January 10, 1962, and Attached Memoranda of Understanding For Protection of Employees in Event of Approval of Merger' * * * provides for employment or compensation to protected or adversely affected employees but with certain strings attached, to wit: '* * * Norfolk and Western shall not be required to provide employment or compensation to any such employe during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed by and paid for to the Sandusky Line employe * * *.'
>
> * * * *
>
> "The appellant, in his appeal, makes the following plea: 'We are also petitioning the Board of Appeals to submit this entire matter, (to) arbitration . . .'
>
> *"Section 1(d) provides for arbitration only in the event the carrier or any of the signatory organizations are at odds or disagreement. In the instant case, there is no such disagreement between our Brotherhood and Norfolk and Western. The only disagreement we can*

see in this case is that of the appellant with the efforts of the representatives of the Brotherhood in their implementing and complementing the already existing guide lines established in [the 1962 agreement].

* * *

"We are convinced that no valid reasons have been put forth that would warrant the setting aside of either the Implementing Agreement '1-A' or the Letter of Understanding of October 25, 1965, under appeal.

"We believe that General Chairman J. F. McNeel's actions in the instant case are right, proper and just and in conformity with the controlling [provisions of the 1962 agreement]."

Thus, the representatives of the employees who negotiated the agreements in question were clearly of the view that Implementing Agreement 1-A was in conformity with the 1962 agreement and was necessary to implement and effectuate the general protection standards of that agreement. In view of this controlling evidence of the purpose and intent of the parties to both agreements, the contrary interpretation by the courts below is wholly insupportable. It follows, therefore, that Implementing Agreement 1-A did not abridge any rights previously vested in respondents by the 1962 agreement and, accordingly, disposes of respondents' claims in this proceeding.

In any event, the conclusion of the courts below that an agreement subsequent to Commission approval of a merger is invalid unless it is totally consistent with any previous order entered by the Commission for the protection of the covered employees finds no basis in the language of Section 5(2)(f). The last sentence of that Section, which is the only provision dealing with voluntary agreements, provides as follows:

"Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests

> of said employees may hereafter be entered by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

It contains no limitations of any kind on the type of agreement which may be reached by the carriers and the employees' representatives. Certainly, it does not state or imply that the agreement must be consistent with either previous Commission orders or with the requirements of the second sentence of Section 5(2)(f). Indeed, it provides that nothing in the Act shall operate to prohibit the making of such an agreement. Despite this language, the court concluded that the Interstate Commerce Act and the Commission order issued pursuant to it prohibited and invalidated Implementing Agreement 1-A. Implementing Agreement 1-A is "an agreement pertaining to the protection of the interest of said employees" and it was entered into "by . . . any carrier. . . . and the duly authorized representative . . . of its . . . employees" after the date of enactment of the Section and also after the Commission order approving the merger. By the terms of the Act, it is, therefore, valid and binding upon the parties.

The proper interpretation of the terms of Section 5(2)(f) is confirmed by the legislative history of that Section which has already been discussed (*supra,* pp. 25-34). Without repeating that discussion, two significant points should be made. First, that history firmly established that the right of carriers and unions to resolve disputes over labor protective benefits by voluntary agreement was viewed as an *alternative* to Commission prescription of protective conditions. Certainly, if a voluntary agreement is required to be consistent with Commission prescribed terms, it would not be a meaningful alternative to such a prescription. Thus, the argument that agreements made pursuant to the last sentence of 5(2)(f) are in some way limited by what

the Commission has prescribed for employee protection is inconsistent with the legislative history. Second, the legislative history establishes that the second sentence of 5(2)(f) was intended to serve as a limitation on *the Commission's* authority to exercise discretion in requiring "a fair and equitable" plan for employee protection under the first sentence. This was done because of labor's fear that the *Commission* might prescribe inadequate protection for employees. It was not included, as the decisions below suggest, because of union fears that voluntary agreements made by the unions themselves would not adequately protect employees.

Unless the lower courts' interpretation of Section 5(2)(f) is rejected, the federal courts will become forums in which any dissident union member, who is unhappy with the protective benefits his union has obtained for him, can seek to obtain preferred treatment by litigating questions involving the proper interpretation of the various documents which govern such protection. This would inevitably require federal courts to interpret agreements between labor unions and employers as an initial matter and without the benefit of prior consideration by established administrative agencies or processes. Such an approach is completely inconsistent with the firmly-established Congressional policy to leave the interpretation of such agreements to expert administrative bodies.

III. UNDER THE CONTROLLING DECISIONS OF THIS COURT, BRT'S GOOD FAITH ABANDONMENT OF RESPONDENTS' GRIEVANCE SHORT OF ARBITRATION PRECLUDES MAINTENANCE OF THIS ACTION.

Section 1(d) of the January 10, 1962 Agreement provides that in the event of a dispute over the interpretation or application of that agreement which cannot be resolved by

the parties within 30 days, either the BRT or the N & W "may" submit the controversy to arbitration. This provision was also incorporated by reference in Implementing Agreement 1-A. Such a dispute arose when the respondents insisted that the protective benefits which they were receiving from the N & W were less than the benefits to which they were entitled under the January 10, 1962 Agreement. Respondents urged their position upon the BRT and insisted that the BRT pursue this interpretive dispute with the N & W to the ultimate step of arbitration. Pursuant to established union procedures, the BRT's highest appellate body, its National Board of Appeals, granted respondents a full hearing, determined that their position was without merit, and refused to invoke the arbitration provisions of the agreement (A. (I) 148-50). Respondents have never suggested that this decision was made in bad faith or constituted wrongful conduct on the part of the BRT. Under the controlling decisions of this Court, the necessary conclusion from these facts is that respondents are precluded from maintaining this subsequent lawsuit with regard to the same dispute.

The Court of Appeals concluded that because the arbitration clause was permissive in the sense that it did not require arbitration but only permitted either party to submit a dispute to arbitration, dissident employees could file a lawsuit with regard to any dispute which was not actually submitted to arbitration. The Court of Appeals acknowledged that the arbitration clause was mandatory as between the BRT and the N & W in that either party could require the other to settle any dispute through arbitration but, nevertheless, held that dissident employees could ignore this mandatory arbitration process when their claim was rejected by the union short of arbitration (A. (II) 191). This holding means that any grievance procedure which permits the union to abandon an employee's

claim short of final resolution would have the effect of allowing the employee to litigate the abandoned claim in court.

The court below also held that it was unnecessary for the employees to exhaust the arbitration procedure since "it would have been a futile gesture for the appellees to have attempted to proceed further with . . . arbitration" (A. (II) 192). Presumably, the court's holding in this regard was based on the fact that only the union could submit the dispute to arbitration and the union had refused to do so. By a species of circular reasoning, the Court of Appeals thus resolved the question of *whether* an employee should be bound by his union's good faith refusal to exhaust available grievance procedures by concluding that the employee was not bound *because* the union had refused to exhaust the grievance procedures on the ground that the employee's argument was untenable.

Although the court below has cast its conclusions in terms of construing the arbitration clause and in terms of excusing exhaustion because of futility, it has held, in effect, that the union's good faith refusal to process respondents' claim through the grievance procedure which it controls precludes the N & W from raising the defense of failure to exhaust administrative remedies. This result is directly contrary to this Court's resolution of the issue in *Republic Steel* v. *Maddox,* 379 U.S. 650 (1965), and *Vaca* v. *Sipes,* 386 U.S. 171 (1967).

In *Maddox,* which involved an arbitration clause providing that grievances may be submitted to arbitration by either the union or the employer, this Court held that an employee could not sue his employer for breach of the collective bargaining agreement without first affording the union an opportunity to handle the grievance on his behalf. A contrary result, this Court concluded, would "deprive

employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances and 'would inevitably exert a disruptive influence upon both negotiation and administration of collective agreements'" (379 U.S. at 653).

This Court in *Maddox* did not specifically deal with the consequences of union refusal to press a grievance to final resolution, stating that "differences may arise as to the forms of redress then available" (379 U.S. at 652). Subsequently, in *Vaca* v. *Sipes,* this Court considered that issue in detail and concluded that in such a situation an employee was precluded from bringing a judicial action against either the union or the employer in the absence of a showing that the union's refusal to take the matter to arbitration was arbitrary, discriminatory or in bad faith. Discussing the relative interests of the union, the employee and the employer, this Court stated (386 U.S. at 191):

> "Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement . . . In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interests of the union as statutory agent and as co-author of the bargaining

agreement in representing the employees in the enforcement of that agreement."

Based upon these policy considerations, this Court held that where an employee's union has failed to exhaust the administrative remedies available to it, an employee may sue his employer for breach of contract only if (386 U.S. at 186):

> ". . . the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance."

Vaca v. *Sipes* thus established the rule that an employee is bound by the good faith failure of his union to exhaust the arbitration provisions of a collective bargaining agreement. The decision of the Court of Appeals in this case clearly violates this rule since it permits an employee to sue his employer when the employee's collective bargaining representative has failed to process the employee's claim to final resolution under the grievance procedure because of a good faith determination by the union that the employee's claim was without merit.[10]

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[10] The Court of Appeals relied on the decision in *Glover* v. *St. Louis—S.F.R. Co.*, 393 U.S. 324 (1969) to justify its refusal to follow the principles enunciated in *Vaca* v. *Sipes* (A. (II) 192). In *Glover*, Negro union members sued their union and their employer for conspiring to discriminate against them because of race. The Court concluded that where "the bargaining representatives of the car employees have been acting in concert with the railroad employer to set up schemes and contrivances to bar Negroes from promotion wholly because of race" the plaintiffs "should [not] be required to submit their controversy to 'a group which is in large part chosen by the [defendants] against whom their real complaint is made' ". That holding has no conceivable application to the present controversy. Here there is no allegation of discrimination or wrongful conduct by the union; the complaining employees in this case did resort to the grievance procedure and the union in good faith determined that their claim was without merit.

In the present case, the determination by respondents' collective bargaining representative that respondents' claims were without merit and did not warrant submission to arbitration was clearly a reasonable and informed decision. Respondents' collective bargaining representative had negotiated agreements with the N & W which clearly fixed respondents' protective benefits. Moreover, the benefits available to the respondents under the agreements thus made were substantial and preferable in many respects to the benefits which might have been prescribed by the Commission in the absence of such agreements (as discussed at pp. 41-45, *supra*). It was pursuant to the option contained in these agreements that respondents had elected to sever their employment relationship with the Pennsylvania and to become employees of the N & W, after being fully advised of the applicable protective benefits. In these circumstances, the determination of respondents' union that "no valid reasons have been put forth that would warrant the setting aside of either the Implementing Agreement 1-A or the Letter of Understanding of October 25, 1965" (A. (I) 150) is binding on respondents and clearly precludes this litigation.

The holding of the Court of Appeals in this case also conflicts with the law established in other circuits where the Courts of Appeal have followed *Vaca* v. *Sipes* in identical situations. In *De Arroyo* v. *Sindicata De Trabajadores Packing*, AFL-CIO, 425 F.2d 281, 284-85 and f.n. 3 (1st Cir. 1970), cert. den. 400 U.S. 877 (1970), the Court of Appeals for the First Circuit considered the question of whether employees could sue their employer for breach of contract despite their union's refusal to exhaust the grievance procedure of the contract which gave the union control of that procedure and permitted it to abandon a grievance without exhausting the procedure. The Court held that an employee

could not properly sue his employer in the face of a refusal of the union to exhaust the grievance procedure where the refusal was not arbitrary. The Court of Appeals for the Fifth Circuit reached the same result in *Boone* v. *Armstrong Cork Company*, 384 F.2d 285, 291-92 (5th Cir. 1967). These governing decisions in the First and Fifth Circuits are in direct conflict with the decision below.

The decision of the court below is also contrary to several unappealed District Court decisions: *O'Sullivan* v. *Getty Oil Company*, 296 F. Supp. 272 (D. Mass. 1969); *Rivera* v. *NMU Pension & Welfare & Vacation Plan*, 288 F. Supp. 874 (E.D. La. 1968); and *Williams* v. *Wheeling Steel Corporation*, 266 F. Supp. 651 (N.D. W.Va. 1967).

Although the decisions delineating the *Vaca* v. *Sipes* doctrine, which the Court of Appeals refused to follow, involve suits under the Labor Management Relations Act, these decisions are equally applicable to a situation in which an arbitration provision has been voluntarily incorporated in a Railway Labor Agreement. This Court has recognized the applicability of the principles of *Vaca* v. *Sipes* to railway labor agreements arising out of mergers. *Czosek* v. *O'Mara*, 397 U.S. 25 (1970). The desirability of maintaining a uniform, exclusive and orderly system for administering collective bargaining agreements and the need to preserve the union's role in and control over that process are equally compelling. Indeed, in a merger situation which places unusual stress on labor relations, these goals are of even greater importance. The Court of Appeals did not refuse to apply *Vaca* v. *Sipes* because this case involves a railway merger but simply misinterpreted its holding.

The court below also sought to lift the bar to this litigation arising from respondents' failure to exhaust administrative procedures by holding that the arbitration clause,

which provided that either party "may" refer disputes to arbitration, "was permissive until such time as the union or appellant invoked arbitration" (A. (II) 191). In reaching this conclusion, the lower court recognized that its holding was in conflict with "the conclusion reached by the Eighth Circuit [*Bonnot* v. *Congress of Independent Unions, Local #14,* 331 F.2d 355] that the 'may' clause is absolutely mandatory, in the sense of requiring either arbitration or abandonment of the aggrieved party's claim" (A. (II) 191).

In *Bonnot,* the arbitration clause provided that "either party may request arbitration" in the event of disagreement as to the interpretation or application of the contract. Mr. Justice Blackmun correctly interpreted this type of agreement, stating (331 F.2d at 359):

> "The obvious purpose of the 'may' language is to give an aggrieved party the choice between arbitration and abandonment of its claim."[11]

The contrary holding of the court below in the present case means that dissident employees may institute judicial proceedings with respect to any dispute which has not been submitted to arbitration. If a union rejects a frivolous claim short of arbitration, the employee involved is then free, under the decisions below, to ignore the arbitration process and to proceed in court.

In such a situation, the employer could preserve the applicability of the grievance procedures only by engaging

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[11] Other courts have considered the question and reached identical conclusions: *Arnold* v. *L&N R. Co.,* 180 F. Supp. 429, 436 (M.D. Tenn. 1960); *Thompson* v. *St. Louis—San Francisco Ry. Co.,* 113 F.Supp. 900, 902-03 (S.D. Ala. 1953); and *Parsons* v. *Norfolk and Western Ry. Co.,* 310 F.Supp. 1197 (S.D. W.Va. 1970), Aff. ____ F.2d ____ (4th Cir., 1971) involving the same arbitration clause as is involved here.

in the morally questionable and entirely wasteful activity of itself processing the controversy through the grievance procedures against a union that has already gone on record as agreeing with the employer's interpretation of the agreement. No arbitration provision should be given an interpretation so disruptive of the orderly administration of the agreement and so obviously harmful to the proper function and prestige of the union unless the agreement clearly and unambiguously requires it. The mere fact that the agreement provides that either the union or management "may" submit a dispute to arbitration certainly does not require such a result. As this Court stated in *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, 658-59 (1965):

> "Use of the permissive 'may' does not of itself reveal a clear understanding between the contracting parties that individual employees, unlike either the union or the employer, are free to avoid the contract procedure and its time limitations in favor of a judicial suit. Any doubts must be resolved against such an interpretation."

Mr. Justice Blackmun properly interpreted this type of agreement in the *Bonnot* case and the holding of that case should be established by this Court as the proper one. It follows, therefore, that the decisions below must be reversed with directions to dismiss because of respondents' failure to exhaust administrative remedies.[12]

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[12] If the arbitration provisions of the 1962 agreement are considered inappropriate for any reason, the dispute as to the protective benefits payable to respondents would, nevertheless, be subject to the processes of the National Railroad Adjustment Board. *O'Mara* v. *Erie Lackawanna Railroad Company,* 407 F.2d 674 (2nd Cir., 1969), affirmed *sub. nom. Czosek* v. *O'Mara* 397 U.S. 25 (1970).

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit Court of Appeals should be reversed with directions to dismiss for lack of jurisdiction and for failure to exhaust administrative remedies.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-97

NORFOLK AND WESTERN RAILWAY CO., PETITIONER

v.

RICHARD NEMITZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

OPINIONS BELOW

The opinion of the court of appeals (App. II, at 179–193) is reported at 436 F. 2d 841. The opinions of the district court (App. I, at 19–36, 43–58) are reported at 287 F. Supp. 221 and 309 F. Supp. 575.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1971. The petition for a writ of certiorari was filed on March 15, 1971, and was granted on May 24, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In this case the court of appeals upheld the district court's jurisdiction on the ground that plaintiffs, who are employees of the Norfolk & Western Railway Company, were seeking damages for violation of an order of the Interstate Commerce Commission (see 49 U.S.C. 8 and 9). Although plaintiffs' action involves interpretation of the terms of a collective bargaining agreement, the court held that this 1962 agreement for the protection of employees became incorporated in the Commission's 1964 order approving N & W's application to merge;[1] the court so held on the ground that the Commission has a duty to review the adequacy of protective conditions in agreements entered into pursuant to the last sentence of Section 5(2)(f) of the Interstate Commerce Act (49 U.S.C. 5(2)(f)). This case, therefore, presents the question whether the Commission has such a duty and thus should be held to have incorporated the 1962 agreement into its later order so that plaintiffs' rights to protection from the adverse consequences of N&W's merger flow from a Commission order rather than from a collective bargaining contract.[2]

STATUTE INVOLVED

Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. 5(2)(f), provides:

> As a condition of its approval, under this paragraph (2), of any transaction involving a

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[1] *Norfolk & Western Ry. Co. and N.Y., C. & St. L. R. Co. Merger*, 324 I.C.C. 1.

[2] This is the only question to which this brief *amici curiae* is addressed.

carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

INTEREST OF THE AMICI CURIAE

This case raises important issues concerning the scope of the Interstate Commerce Commission's obligations under Section 5(2)(f) to protect employees affected by rail mergers and concerning the impact of a Commission order approving a merger upon prior and subsequent labor agreements. The court of appeals' interpretation of Section 5(2)(f) is directly contrary to the interpretation the Commission has consistently given it for many years. This is a matter of interest

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both to the Commission and to the United States, which is a statutory party in proceedings for judicial review of orders approving rail mergers.[3] The present question may well arise in connection with a substantial number of future and past rail mergers where the surviving railroad has agreements with employee representatives concerning employee protection.

STATEMENT

The four plaintiffs in this case are employees of the Norfolk and Western Railway Co. ("N&W") and members of Cedar Point Lodge No. 844 of the Brotherhood of Railroad Trainmen.[4] Until October 16, 1964, they were employed as brakemen in the Toledo Division of the Pennsylvania Railroad Company and worked on the Pennsylvania's Sandusky Line. This case concerns the effect of N&W's purchase of that line on the plaintiffs.

In applications filed with the Interstate Commerce Commission in 1961, N&W sought approval under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2), to merge with the New York, Chicago and St. Louis Railroad Company ("Nickel Plate"), to acquire control of the Wabash Railroad Company and lease its railroad line, and to purchase the Sandusky Line of the Pennsylvania Railroad Company.[5] The

[3] The United States has concluded, however, that its interest in the present case does not differ from that of the Commission.

[4] Plaintiffs sued on behalf of "approximately twenty-five" similarly situated members of Cedar Point Lodge No. 844 (App. I, at 5).

[5] *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 324 I.C.C. 1, 4–5.

Sandusky Line, extending from Columbus, Ohio, to the shores of Lake Erie at Sandusky, provided a connecting link between lines of the N&W and those of the Wabash and Nickel Plate; its acquisition gave N&W a direct route for marketing lake cargo and vessel fuel coal, the main commodities handled over the Sandusky Line.[6]

On June 24, 1964, the Interstate Commerce Commission, acting pursuant to Section 5(2) of the Act, approved the proposed transactions, including N&W's purchase of the Sandusky Line. 324 I.C.C. 1.

In January 1962, more than two years before the Commission's authorization but while the railroads' applications were pending, the N&W, the Brotherhood of Railroad Trainmen, and other unions, entered into an "Agreement For Protection of Employees in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Company And Other Carriers" (App. I, at 60). The parties expressly executed the agreement "in accordance with the last sentence of Section 5(2)(f) of the Interstate Commerce Act" (App. I, at 62). In addition to incorporating the Washington Job Protection Agreement of 1936[7] with certain modifications, including a provision for arbitration of disputes, the 1962 agreement essentially provided for a voluntary "job freeze": jobs could not be eliminated

[6] *Id.* at 66, 83, 88.

[7] The Washington Agreement is described in *Railway Labor Ass'n* v. *United States*, 339 U.S. 142, 147 n. 7, and is published in Hearings held by the House Committee on Interstate and Foreign Commerce on H.R. 2531, 76th Cong., 1st Sess. 231-241 (1939).

as a result of the proposed transactions except through normal attrition and employees could not be dismissed for the sake of greater economy, although the carrier might transfer their work to a different location (App. I, at 62–69).[8]

Section 3 of the agreement related specifically to the Sandusky Line (App. I, at 67). Those who worked on that line were employees of the Pennsylvania Railroad. Their working territory consisted of the entire Toledo Division, of which the Sandusky Line was a part (App. II, at 179). The Sandusky Line did not operate year-round; when Lake Erie froze over during the winter, the line shut down (App. II, at 179–180). Thus, the Pennsylvania Railroad employees who had exercised employment rights on the Sandusky Line worked there when work was available, but during slack seasons and at other times they could exercise their seniority rights and work elsewhere in the Toledo Division (App. II, at 179–180). Section 3 of the 1962 agreement provided that N&W would employ all employees represented by the signatory unions who "have exercised employment rights on said Sandusky Line" and who, at the time of the acquisition, "elect to accept such employment" (App. I, at 67). Section 3 further stated that "none of such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment" except that N&W would not be obligated to provide employment "of greater duration than such employee enjoyed on said line in the twelve

[8] See also 324 I.C.C. at 106.

months' period immediately preceding the effective date of said acquisition" (App. I, at 67). Employees would not be protected against any "furlough because of reduction in forces due to seasonal requirements as aforesaid or decline in volume of traffic or revenues" (App. I, at 68). Also, N&W would assume responsibility for all labor agreements relating to the Sandusky Line,

> other than provisions therein (1) granting employees employed on said Line seniority or employment rights beyond said Line and (2) granting seniority or employment rights on said Line to employees having employment rights beyond said Line * * * subject to changes in accordance with the provisions of the Railway Labor Act * * *. [App. I, at 68.][9]

In recommending that the railroads' applications be approved, the Commission's hearing examiner noted that N&W had entered into an agreement with the labor unions, and stated that "In view of this agreement, no conditions need be imposed under any authority granted herein for the protection of those employees covered by such agreement." 324 I.C.C. at 106. The Commission, in authorizing the transactions, referred to these collective bargaining agreements and made its authorization "subject to such agreements." 324 I.C.C. at 50. For the benefit of employees not covered by the 1962 agreement, the Commission imposed a detailed set of protective conditions pursuant to the first two

[9] Following the Commission's approval of the merger, N&W and the unions also entered into various implementing agreements (App. I, at 83).

sentences of Section 5(2)(f); these conditions included dismissal allowances, lump-sum separation allowances, moving expenses, and other protections.[10]

After plaintiffs elected to become employees of N&W on the Sandusky Line, they received less work than they had received while they were with the Pennsylvania Railroad, where they worked not only on the Sandusky Line, but also throughout the Toledo Division. They requested N&W to compensate them for the difference between their average monthly wage as employees of the Pennsylvania Railroad over the entire Toledo Division in the twelve months preceding the merger, and what they earned per month working for N&W (App. I, at 11–13). N&W said it would pay only the difference between plaintiffs' N&W wages and their average monthly wages on the Sandusky Line alone in the twelve-month period before the acquisition (*id.*), and denied further compensation on the basis of its interpretation of the 1962 agreement. But by October 1965, N&W had failed to pay even this amount because it had not yet received sufficient wage data from the Pennsylvania Railroad. After the Brotherhood of Railroad Trainmen threatened to invoke arbitration under Section 1(d) of the 1962 agreement (App. I, at 102–106), the parties entered into Implementing Agreement I–A on October 25, 1965 (App. I, at 85–88). This provided that until N&W received sufficient data to calculate the employees' earnings on the Sandusky Line during the

[10] 324 I.C.C. at 50, incorporating by reference the conditions in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557; 317 I.C.C. 729; 320 I.C.C. 377.

year before the acquisition, N&W would figure each employee's average monthly compensation for that period on the basis of 75 percent of his earnings throughout the Toledo Division. If he had been earning less than 75 percent at N&W, he would be paid the difference by N&W.[11]

Plaintiffs were still dissatisfied because, in their view, the contract required their minimum average monthly wage to correspond to their prior earnings not just on the Sandusky Line, but throughout the Toledo Division (App. I, at 129–130). Pursuant to a memorandum of understanding between the unions and N&W (App. I, at 77–79), entered into at the time of the 1962 agreement, plaintiffs submitted their claims to the local chairman of their union. When the local chairman declined to pursue the claims on the ground that the employees were not entitled to greater compensation under the 1962 agreement, plaintiffs appealed to the National Board of Appeals of the Brotherhood of Railroad Trainmen. After holding a hearing and considering numerous exhibits, the Board, on September 16, 1966, rejected the claim and refused to seek arbitration with N&W. The Board of Appeals stated that arbitration was inappropriate since "there is no such disagreement between our Brotherhood and Norfolk and Western" (App. I, at 149), and that the 1962 agreement had expressly provided that N&W "shall not be required to provide employment or compensation * * * of greater duration or amount than

[11] When N&W finally calculated an employee's actual average monthly wage on the Sandusky Line, any overpayments would have to be paid back to N&W (App. I, at 90–91).

was performed by and paid for to the Sandusky Line employees * * *" (App. I, 148).

Plaintiffs then commenced the present action in the district court under Section 9 of the Interstate Commerce Act, 49 U.S.C. 9, on the theory that N&W had acted contrary to the 1962 agreement, that the Commission had incorporated the agreement in its 1964 order authorizing N&W's purchase, and that N&W had therefore violated an order of the Interstate Commerce Commission. The district court agreed (App. I, at 43–58). The court of appeals affirmed (App. II, at 179–193), holding that under Section 5(2)(f) of the Act the Commission is required to provide protection for affected employees whether or not a prior agreement exists between the employees' representative and the railroad (*id.* at 185). Accordingly, the court construed the Commission's report as having "first determined that the protective conditions in the 1962 agreement were adequate" and having then incorporated them in the order (*id.* at 185–186).

SUMMARY OF ARGUMENT

The first two sentences of Section 5(2)(f) of the Interstate Commerce Act require the Interstate Commerce Commission, as a prerequisite to approving a transaction under Section 5(2), to impose protective conditions for the benefit of railroad employees affected by the transaction. The last sentence of Section 5(2)(f), however, provides that "Notwithstanding any other provisions of this Act" the carrier and the representatives of the affected employees may enter into a collective bargaining agreement pertain-

ing to the protection of the employees. The Commission has interpreted Section 5(2)(f) to mean that when the union has negotiated a protective agreement with the carrier, the Commission has no responsibility to review that agreement under Section 5(2)(f) because such an agreement in itself satisfies the requirements of that Section. The legislative history of Section 5(2)(f) supports the Commission's view that, by adding the "Notwithstanding" clause, Congress intended to allow such agreements to be freely negotiated without being subject to Commission review under that Section.

At the time Congress passed Section 5(2)(f), all but a small percentage of the railroad employees in the country were protected from the effects of mergers and similar transactions by the Washington Job Protection Agreement of 1936. By requiring the Commission to impose protective conditions, Congress intended in the first two sentences of Section 5(2)(f) to grant similar protection to employees not covered by the Washington Agreement. But Congress did not intend to require the Commission to review the adequacy of agreements the unions and railroads might enter into in the future. The unions themselves drafted the "Notwithstanding" clause; in view of the unions' expressed desire to preserve free collctive bargaining with respect to employee protection, it is reasonable to conclude that the very purpose of that clause was to make clear that freely negotiated agreements would not be subject to Commission review under Section 5(2)(f). In addition, when Congress passed Section 5(2)(f),

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many of the nation's railroads were in bankruptcy. In these circumstances, Congress clearly did not intend to require the Commission to demand employee protection according to the first two sentences of Section 5(2)(f) if the union would agree to less so that the carrier could merge in order to avoid shutting down and if requiring greater employee protection might make it financially impossible for the carrier to merge at all.

The decision of the court of appeals would require the Commission to intrude on the collective bargaining process by altering the terms of previously negotiated agreements. The result would necessarily be to discourage settlement of these matters in the future through negotiation, and thus would contravene the strong congressional policy in favor of having labor differences settled through collective bargaining rather than having agencies or courts impose settlements on labor and management. The Commission's consistent practice for three decades in refusing to review negotiated agreements promotes collective bargaining and avoids Commission intervention in labor-management relations, an area where it has no special expertise. The Commission is responsible for administering Section 5(2)(f); the courts should thus give great weight to its long-standing interpretation of that Section.

Since the Commission did not review the agreement in this case under Section 5(2)(f), and since it had no responsibility to do so, the court below erred in upholding the district court's jurisdiction on the ground that the Commission must have incorporated

the terms of the previously negotiated agreement in its order approving N&W's acquisition of the Sandusky Line. The employees' rights to protection flowed from the collective bargaining agreement, not the Commission's order, and the district court therefore did not have jurisdiction over plaintiffs' claims for damages under 49 U.S.C. 9.

ARGUMENT

I. THE LAST SENTENCE OF SECTION 5(2)(F) OF THE INTERSTATE COMMERCE ACT ALLOWS A RAILROAD AND THE REPRESENTATIVES OF ITS EMPLOYEES TO REACH A FREELY NEGOTIATED AGREEMENT ON EMPLOYEE PROTECTIVE CONDITIONS WHICH IS NOT SUBJECT TO COMMISSION REVIEW UNDER THAT SECTION

In the Transportation Act of 1940, Congress revised Section 5 of the Interstate Commerce Act to empower the Commission to authorize voluntary railroad mergers and other financial transactions. While hoping that such transactions would bring about much-needed economies in railroad operations, Congress at the same time realized that reducing jobs on the merging lines for the sake of efficiency could place a severe burden on the affected employees. In the first two sentences of Section 5(2)(f), Congress therefore directed the Commission to include protective conditions for employees in its orders authorizing transactions under Section 5(2). In the last sentence of Section 5(2)(f), however, Congress provided that "Notwithstanding any other provision of this Act" carriers and unions could enter into agreements pertaining to the protection of the interests of the affected employees.

This case involves the effect of a collective agreement entered into pursuant to the last sentence of Section 5(2)(f) on the Commission's responsibility under the first two sentences of that provision. The court of appeals held that the Commission must review every such agreement to determine whether the union has negotiated adequate protection for its members. In the Commission's view, however, Section 5(2)(f) requires it to impose protective conditions only if the representatives of the affected employees have not entered into a protective agreement with the carriers; if such an agreement has been negotiated pursuant to the last sentence of Section 5(2)(f), the Commission has no responsibility to review it under the first two sentences of that Section.

A. BACKGROUND OF CONGRESS' CONSIDERATION OF LEGISLATION LEADING TO ENACTMENT OF THE TRANSPORTATION ACT OF 1940

Mr. Justice Frankfurter's observation that "words acquire scope and function from the history of events which they summarize," [12] is particularly pertinent to Section 5(2)(f). That provision is the culmination of a decade of experience, during which the carriers, the unions, and the government sought a solution to the economic troubles that beset the railroads.[13]

The economic depression of the 1930's had a devas-

[12] *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 186.

[13] The events leading to enactment of the Transportation Act of 1940 are discussed in an Appendix to the Court's opinion in *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 315.

tating impact on the railroad industry. By 1932, business had been cut in half, half of the railroads' employees had been laid off, many lines had declared insolvency, and even the strongest were struggling to avoid bankruptcy court.[14] Congress responded by passing the Emergency Railroad Transportation Act of 1933, 48 Stat. 211. The Act created an Office of Federal Coordinator of Transportation and, among other things, sought to encourage coordination of carrier activity for the purpose of eliminating waste and needless expense. Section 7(b), however, prevented carriers from reducing the number of their employees as a result of action taken pursuant to the Act and guaranteed that no employee would "be in a worse position with respect to his compensation" as a consequence of such action.

The Emergency Act continued in effect until 1936. During these three years the Act brought about little railroad coordination and still less improvement in the condition of the railroad industry.[15] On February 1, 1936, after efforts to secure voluntary action had failed, Joseph B. Eastman, the Federal Coordinator of Transportation, announced that he would shortly order unification in twelve different railroad terminals.[16] The proposed order caused great concern throughout the industry. Carriers threatened to challenge the Coordinator's authority in court; the unions

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[14] See Van Metre, *Transportation in the United States* 337 (1939).

[15] See generally Latham, *The Politics of Railroad Coordination 1933–1936* (1959).

[16] *Id.* at 244, 245.

sought legislation to prevent any reduction in railroad employment. Finally President Roosevelt intervened and urged both sides to settle their differences through collective bargaining. His letter to the carriers and the unions stated in part:

> The Emergency Railroad Transportation Act, 1933, undertook to promote the elimination of railroad waste and at the same time protect the employees. This protection is now satisfactory neither to the companies nor to the employees * * *. It is a matter which is capable of being settled to better advantage by negotiation than by legislation. Given sufficient time the management, and the men ought to be able to agree in their common interests upon a reasonable plan of protection.[17]

Negotiations ensued and on May 31, 1936, the parties announced the signing of the Washington Job Protection Agreement. This Agreement, which covered approximately 85 percent of the railroad mileage in the country,[18] was to be in effect for five years from June 18, 1936, and was to continue in effect thereafter, although a carrier or union could then withdraw one year after giving notice. The Agreement provided that employees who continued in service after a coordination would not be placed in a worse position with respect to their compensation for five years after the effective date of

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[17] The letter is reprinted in Hearings on H.R. 2531 before the House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess., at 1721–1722 (1939).

[18] Statement of George M. Harrison, in Hearings, *supra* note 17, at 216.

the transaction.[19] Employees dismissed as a result of the coordination would receive a "coordination allowance" of 60 percent of their average monthly pay prior to the transaction. The period of payment depended on the employee's length of service: for example, those with one to two years of seniority would receive an allowance for 6 months; employees with more than 15 years service would be paid for 60 months.[20] An employee's dismissal allowance could be reduced only by other railroad earnings. After the Agreement had been signed, the carriers and the unions joined in urging that the Emergency Transportation Act of 1933 be allowed to expire in 1936.[21]

B. LEGISLATIVE HISTORY OF SECTION 5(2)(F) OF THE INTERSTATE COMMERCE ACT

When the condition of the railroad industry showed no signs of improving, President Roosevelt appointed, in 1938, a Committee consisting of three railroad executives and three representatives of railway labor (the "Committee of Six") to recommend legislation. In December 1938 the Committee of Six submitted its report to the President. Although the Coordinator of Transportation under the 1933 Emergency Act would have required railroad consolidations as a means of achieving efficiencies in operation,[22] the Committee of Six rejected this approach and suggested instead an easing of restrictions on mergers and consolidations

[19] The Agreement is reprinted in Hearings, *supra* note 17, at 231–241.

[20] *Id.* Section 7.

[21] Latham, *supra*, note 15, at 244–266.

[22] See S. Doc. No. 119, 73d Cong., 2d Sess. 30–33, 36–37, 86–88.

voluntarily entered into by the carriers.[23] In early 1939, with approximately one-third of the railroad mileage in the country in bankruptcy,[24] Congress began consideration of legislation that eventually led to passage of the Transportation Act of 1940, and, specifically, Section 5(2)(f) of the Interstate Commerce Act, the provision at issue in this case.

The bill (H.R. 2531) initially considered by the House Committee on Interstate and Foreign Commerce included standards for the approval of mergers and other transactions, but contained no provision for the protection of workers affected by these transactions. Joseph B. Eastman, a member of the Interstate Commerce Commission and formerly Coordinator of Transportation under the Emergency Act of 1933, explained that such a provision was unnecessary because the matter could properly be handled by negotiation, as the Washington Job Protection Agreement illustrated.[25] The Committee of Six, however, recommended a provision that would require the Commission to demand, "as a prerequisite to its approval a fair and equitable arrangement to protect the in-

[23] Report of Committee Appointed September 20, 1938, by the President of the United States to Submit Recommendations upon the General Transportation Situation, December 23, 1938, pp. 30–32, reprinted in Hearings, *supra* note 17, at 259–308.

[24] Statement of George M. Harrison, in Hearings, *supra* note 17, at 208; see also 86 Cong. Rec. 10184 (1940).

[25] Hearings, *supra* note 17, at 1722. As Federal Coordinator, Eastman had recommended that the problem be settled by agreement after negotiation between the unions and the carriers. See *Fourth Report of the Federal Coordinator of Transportation on Transportation Legislation*, H. Doc. No. 394, 74th Cong., 2d Sess. 50–58 (1936).

terests" of the affected employees.[26] George M. Harrison, chairman of the Railway Labor Executives Association and a member of the Committee of Six, testified on behalf of the Committee. After referring to the Washington Job Protection Agreement of 1936, and stating that the Agreement had worked out "very satisfactorily," Harrison explained why the Committee had recommended legislation for the protection of employees:

> Well, you might very properly ask the question, If we have such an agreement why we want to put anything in the law? Well, the reason for it is that about 15 percent of the mileage of the country refuses to come into the agreement. You always have the willful minority that will not go along with the general good and so you have got to make those people do what is right, assuming that what has been done is right, and so we propose that this Transportation Board be given the authority to impose and require protection for men who are adversely affected when the changes are made.
>
> Now, the exact formula of that, of course, I am not here prepared to suggest, but at least we have solved that problem through collective bargaining with management and if we could get all of the roads into the agreement we would not even suggest any protection as a matter of law. [*Id.* 216–217.]

When asked whether the Washington Agreement had been satisfactorily maintained, Harrison replied that

[26] Hearings, *supra* note 17, at 275.

although some employees "do not believe it is as liberal as it ought to be," nevertheless

> We have settled the question through collective bargaining and if it is not satisfactory, the burden is on us to proceed in the same way to try to change it. [*Id.* at 243.]

Harrison summed up the reasons for the Committee's proposal with respect to employee protection by stating how he would explain it to the carriers that had signed the Washington Job Protection Agreement:

> "We have settled that question with you, and you are willing to accept it."
>
> "We have got some roads, however, that have not come in and you have tried to get them in and you have not succeeeded. So we have to reach them through legislation." [*Id.* at 244.]

The bill introduced and passed in the Senate (S. 2009) contained the provision regarding a "fair and equitable" arrangement that the Committee of Six had recommended. 84 Cong. Rec. 6158 (1939); see S. Rep. No. 433, 76th Cong., 1st Sess. 29. The bill introduced in the House contained a similar provision (see H.R. Rep. No. 1217, 76th Cong., 1st Sess. 12), but during the floor debate Representative Harrington introduced an amendment adding a requirement that the Commission withhold approval if the consolidation would displace workers, or impair their employment rights. 84 Cong. Rec. 9882 (1939). The amendment was agreed to (*id.* at 9887), and the House passed the bill in that form (*id.* at 10127). The Conference Committee, however, eliminated both the Harrington Amendment and the "fair and equitable" language, along

with the entire amendment relating to Commission approval of voluntary railroad mergers and other transactions. H.R. Rep. No. 2016, 76th Cong., 3d Sess. 61 (1940).

The House voted to recommit with instructions to the House managers to restore the "fair and equitable" language and to insist on a revised version of the Harrington Amendment, which closely resembled the final Section 5(2)(f)—"[the] transaction will not result in employes of said carrier * * * being in a worse position with regard to their employment." 86 Cong. Rec. 5886. The House also inserted the "Notwithstanding" clause, which is now the last sentence of Section 5(2)(f). As discussed below, the unions themselves drafted this sentence. Representative Harrington, in urging recommittal, commented that the revised "provision also contains a clause that permits the industry, through the processes of collective bargaining, to work out its problems in a democratic manner." 86 Cong. Rec. 5871. The Conference Committee adopted a modified version of the recommitted House bill (*id.* at 10149–10150), and the House passed it in that form (*id.* at 10194).[27]

The debate on this final version never directly focused on the relationship between the "Notwithstanding" clause and the first two sentences of Section 5(2)(f). Representative Wolverton, a House conferee, did note that some labor representatives had been un-

[27] The legislative history of the first two sentences of Section 5(2)(f) is discussed in *Railway Labor Assn.* v. *United States*, 339 U.S. 142, and *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169.

certain whether the Harrington Amendment would preclude voluntary collective bargaining agreements in the future, and that the one brotherhood that had opposed the consolidation provision had done so on the basis that the matter should "be left at this time as a matter for collective bargaining." 86 Cong. Rec. 10189. Representative Lea said that the "Notwithstanding" clause confirmed the "right of employees to enter into agreements with railroads to take care of them in case of unemployment as a result of consolidations," and that employees were not precluded from making an agreement with a carrier for a period of protection longer than the four-year period provided in the bill. *Id.* at 10178. Representative Halleck was of the opinion that the first two sentences of Section 5(2)(f) gave greater protection than the Washington Job Protection Agreement, the principle of which that Section "writes into law." *Id.* at 10187.

C. THE COMMISSION'S INTERPRETATION OF SECTION 5(2)(f) COMPORTS WITH THE CONGRESSIONAL OBJECTIVES REFLECTED IN THAT SECTION'S BACKGROUND AND LEGISLATIVE HISTORY

The series of events preceding Congress' consideration of the Transportation Act of 1940 and the legislative history of Section 5(2)(f) confirm the Commission's long-standing interpretation that the last sentence of that provision permits a railroad and the representatives of its employees to reach a freely negotiated collective agreement on employee protective conditions which is not subject to Commission review under that Section.

First, as the testimony of George Harrison on behalf of the Committee of Six makes clear, the initial proposals for employee protection were made because some carriers refused to be governed by the Washington Job Protection Agreement of 1936. See p. 19, *supra*. Mr. Harrison emphasized that there was no intention to alter the terms of the Agreement itself, that this should be done, if at all, by collective bargaining and that the proposed legislation was aimed at the employees who were unprotected by that Agreement. There is simply no indication that anyone saw a need to have the Commission review the adequacy of negotiated agreements. To the contrary, the theme running through the hearings, the committee reports and the floor debates was that the collective bargaining process worked quite well when the carriers allowed the process to work at all. But some carriers refused to negotiate, thereby leaving their employees unprotected. This was the mischief sought to be remedied by the proposed legislation.

Second, as mentioned above, union representatives themselves drafted the "Notwithstanding" clause. Once the conferees had reported out the bill entirely excluding a revised consolidation section and further labor protective provisions, the unions agreed among themselves on the scope of the protection they desired and sent a letter to each member of Congress requesting that the consolidation section be reinserted along with revised protection for railroad labor, including

the last sentence of the present Section 5(2)(f).[28] The proposed protection was revised by the conferees, but the "Notwithstanding" clause of the final sentence remained as the unions had drafted it. Thus, in view of the unions' expressed desire to preserve their right to free collective bargaining[29] and the fact that the unions themselves drafted the "Notwithstanding" clause of Section 5(2)(f), it is reasonable to conclude that Congress did not intend to require the Commission to review the unions' voluntary collective bargaining agreements and that the unions insisted on the last sentence of that Section in order to make this clear.

Finally, it is significant that at the time Congress enacted Section 5(2)(f), nearly one-third of the nation's railroads were in the hands of receivers or trustees (see p. 18, *supra*). Some railroads today may be on the brink of shutting down, and, in the future, might be able to save themselves only by merging. Compare *New Haven Inclusion Cases*, 399 U.S. 392, 407–408. Suppose, for example, that such a carrier could not merge at all if it had to absorb the financial burdens of providing compensation for four years for employees dismissed as a result of the merger, and suppose also that the union, knowing this, enters into an agreement

---

[28] Congressman Lea discussed the letter and the unions' proposal, which had been incorporated in a motion to recommit, in a speech of May 3, 1940 (86 Cong. Rec. A2684–A2685). The full text of the letter, including the unions' acknowledgment of authorship of the proposed revision, appears in the magazine *The Railroad Trainman*, vol. 57, p. 342 (June 1940).

[29] See Statement of Representative Harrington, quoted at p. 21 *supra*.

with the carrier for employee protection of three years instead of four as provided in the second sentence of Section 5(2)(f). Under the decision of the court of appeals in this case, the Commission would have to review this agreement, declare it inadequate under Section 5(2)(f), and require protection for four years. As a result, the carrier might be forced to shut down, to the detriment of all concerned. In light of the economic crisis facing the railroad industry in 1940, the carriers and the unions could not have contended for such a result and Congress, we submit, did not intend to require it. Instead, Congress must have intended to allow the Commission to authorize a merger in these circumstances, particularly since the congressional purpose in revising Section 5 in 1940 was to facilitate railroad mergers, see *County of Marin* v. *United States*, 356 U.S. 412, 416. Under the Commission's interpretation of Section 5(2)(f), authorization would be possible, because the collective bargaining agreement would stand as negotiated.

D. THE COMMISSION'S INTERPRETATION OF SECTION 5(2)(f) IS ALSO SUPPORTED BY CONSIDERATIONS OF POLICY AND OF PRACTICALITY AND BY A CONSISTENT COURSE OF ADMINISTRATIVE CONDUCT

In addition to the background and legislative history of Section 5(2)(f), other considerations support the Commission's construction of that provision. The Commission's "experience and expertise is with transportation not labor relations problems."[30] The Com-

[30] *Outland* v. *Civil Aeronautics Board*, 284 F. 2d 224, 228 (C.A.D.C.) (Burger, J.); see *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 173. *Outland* involved whether the Civil Aeronautics Board should impose terms with respect to senior-

mission has acted in the past only in the absence of agreement. Imposing compulsory settlements in job security matters runs contrary to the long-established congressional policy, reflected in the Railway Labor Act, 45 U.S.C. 151 *et seq.* (and the National Labor Relations Act, 29 U.S.C. 158(d)), of relying on negotiation rather than litigation before courts or agencies. Compare *General Committee* v. *M.K.T.R. Co.*, 320 U.S. 323, 337. As this Court recently observed in regard to the Railway Labor Act, there is a "strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements." *Chicago & N.W.R. Co.* v. *Transportation Union,* No. 189, October Term 1970, decided June 1, 1971, slip op. at p. 9 n. 11.

The danger in imposing upon the Commission the duty to follow a contrary policy by reviewing labor agreements under Section 5(2)(f) is evident. Collective bargaining involves mutual give-and-take in an

---

ity to protect employees affected by a merger. The court observed that the Board "has not seen fit to assume that burden and has held that the issue should be resolved by negotiation or arbitration." 284 F. 2d at 228. If the unions and the carriers fail to reach agreement, the Board will appoint an arbitrator to decide what terms would be "just and reasonable" under 49 U.S.C. 1378(b) (compare the first sentence of Section 5(2)(f) of the Interstate Commerce Act). See also *American Airlines, Inc.* v. *Civil Aeronautics Board*, C.A. 2, No. 1083, decided July 23, 1971, upholding the Board's practice in this regard and stating that "If the Board's experience convinced it that the integration of the seniority lists of employees of merging carriers was a function which it was not well suited to perform and which, in the absence of agreement, had best be left to arbitration, that was a judgment it was competent to make." Slip op., at p. 4498.

effort to reach an agreement acceptable to both sides. A union, for example, may opt for greater employment security; the carrier may accept the union's terms in return for a lessening of the period during which it is obligated to provide compensation. If the Commission, or a court for that matter, reviews the resulting agreement according to some minimum standard [31] and then requires that compensation be paid for a longer period than had been agreed upon, the entire collective bargaining process has been upset: The carrier has given in on job security but has received nothing in return. We do not say this is necessarily the situation in the instant case. It is the Commission's position that it should not, in ordinary circumstances (see p. 32, *infra*), review and interpret labor agreements and the Commission has not done so here. But the point remains that the kind of intrusion in the collective bargaining process demanded by the decision of the court below not only frustrates the expectations of the parties, but also, and more important, discourages others from settling these matters through negotiation in the future.

To be sure, in the absence of an agreement protecting affected employees, the Commission must, under

[31] The holding below presumably would require the Commission to decide whether, on balance, a collective bargaining agreement provides protection that is substantially equal to or greater than the protection that would have been obtained under Section 5(2)(f) in the absence of agreement. But we do not believe Congress intended the Commission to engage in such second-guessing of the negotiators' judgment concerning the relative importance of various aspects of employee protection in the particular circumstances of each consolidation.

Section 5(2)(f), impose terms and conditions. But even in such cases the Commission often adopts the terms of previously negotiated agreements, with necessary modifications, and requires that all disputes over the conditions be arbitrated.[32] Indeed, over the years the conditions imposed by the Commission under Section 5(2)(f) have become fairly standardized.[33] The carriers and the unions therefore have a firm idea of what the Commission will require as a condition to its authorization if there is no collective bargaining agreement and their negotiations thus take place in a context in which the adoption of variations from the Commission's standard approach would presumably be deliberate.

Finally, ever since the enactment of Section 5(2)(f) in 1940 it has been the Commission's position that protective agreements entered into pursuant to the last sentence of that provision are not subject to review under that Section. In the first reported case under Section 5 involving such an agreement between rail labor and rail management, decided in 1941 less than one year after that provision had been amended by Section 5(2)(f), the Commission stated that "no condition as to employment is necessary."[34] More recently

[32] See, *e.g.*, *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, 193; *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557, 566–567; *id.*, 317 I.C.C. 729, 730.

[33] See generally *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 159–164.

[34] *Missouri Pac. R. Corp. in Nebraska Trustee Operation*, 247 I.C.C. 653, 657; see also *Gulf, M. & O. R. Co. Purchase*, 261 I.C.C. 623, 625–626; *International-G.N.R. Co. Trustee Trackage Rights*, 282 I.C.C. 30, 36; *Norfolk & Western Ry. Co. Merger, Etc., Virginian Ry. Co.*, 307 I.C.C. 401, 439; *Duluth S.S. & A.R. Co. Merger*, 312 I.C.C. 341, 356–357.

the Commission found in a major proceeding that the interests of employees would be protected by the agreements they had reached, and added, "Under the terms of the last sentence of section 5(2)(f), the entering into such agreements takes from us the obligation of providing protection for employees covered thereby." [35]

Indeed, even though the Washington Agreement of 1936 is not included within the last sentence of Section 5(2)(f) because it was entered into before enactment of that Section,[36] the Commission has held that Section 5(2)(f) did not divest employees of their rights under that Agreement if they are still covered by it.[37] Thus, when the Commission imposes terms and conditions in the absence of a protective agreement under Section 5(2)(f), such employees retain any fur-

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[35] *Great Northern Pac.—Merger—Great Northern Ry. Co.*, 331 I.C.C. 228, 278. The Commission carefully distinguished its duty under the first two sentences to provide protection to employees not covered by the agreements.

Other cases in which the Commission protected employees not covered by voluntary agreements include *Pere Marquette Ry. Co. Merger*, 267 I.C.C. 207, 235, 253; *Gulf, M. & O. R. Co. Purchase, Securities*, 267 I.C.C. 265, 276–277; *Chicago, B. & Q. R. Co. Trackage Rights*, 271 I.C.C. 675, 690–691; *Houston Belt & Term. Ry. Co. Control*, 275 I.C.C. 289, 318; *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 487; *Savannah & A. Ry. Co. Control*, 282 I.C.C 39, 57–58; *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, 544–546.

[36] The last sentence of Section 5(2)(f) refers only to protective agreements "hereafter" entered into.

[37] See *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 166–171, on remand from the decision of this Court in *Railway Labor Executives' Ass'n* v. *United States*, 379 U.S. 199.

ther right to protection agreed to in the Washington Agreement, although they may not receive duplicate benefits.[38]

The Commission's consistent practice in administering Section 5(2)(f) over a period of more than three decades is entitled to great weight when, as here, a court is faced with determining the meaning of that provision. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16.

II. PLAINTIFFS' RIGHTS TO PROTECTION FROM THE EFFECT OF N&W'S ACQUISITION FLOWED FROM COLLECTIVE BARGAINING AGREEMENTS, NOT FROM AN ORDER OF THE COMMISSION, AND THE DISTRICT COURT THEREFORE HAD NO JURISDICTION UNDER 49 U.S.C. 9

In the instant case, therefore, the Commission's statement that no conditions were necessary, 324 I.C.C. at 50, 106, meant only that its duty to protect employees under Section 5(2)(f) had been satisfied by the 1962 agreement. The Commission did not review that agreement in light of Section 5(2)(f) and did not adopt it. As will appear below, the Commission might have considered whether the terms of the agreement rendered the entire transaction inconsistent

[38] See *Southern Ry. Co.*, *supra*, 331 I.C.C. at 169. In accordance with its consistent interpretation of Section 5(2)(f), the Commission noted that the carriers had submitted "proposals to enter into agreements with employees" and that if "the parties agreed to these proposals suggested by applicants, our duty under Section 5(2)(f) would cease," 331 I.C.C. at 176. Since the parties had not agreed, the Commission imposed protective terms and conditions.

with the public interest,[39] but the Commission could not, consistent with the final sentence of Section 5 (2)(f), interfere in the agreement reached for the protection of employees through their authorized representatives. It follows that the court of appeals erred in holding that since the Commission has a duty under Section 5(2)(f) to review previously negotiated agreements pertaining to employee protection, the Commission must have reviewed the 1962 agreement, found it adequate, and then incorporated it in the order authorizing the merger (App. II, at 184–187). The court similarly erred in holding that Implementing Agreement I–A, executed in 1965, violated the Commission's 1964 order.[40] Therefore, since plaintiffs' action relates solely to the breach of a collective bargaining agreement, which had not been incorporated in an order of the Commission, the district court did not have jurisdiction of plaintiffs' claims under 49 U.S.C. 9, which allows private persons to bring actions for damages in the district courts against carriers

[39] See, *e.g.*, *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, 544.

[40] See *Arnold* v. *Louisville & Nashville R.R. Co.*, 180 F. Supp. 429 (M.D. Tenn.), affirmed *sub nom. Batts* v. *Louisville & Nashville R.R. Co.*, 316 F. 2d 22 (C.A. 6), holding that employees could, through collective bargaining agreements with the carrier entered into after the Commission's order, revise the terms and conditions imposed by the Commission for their protection. Compare *Clemens* v. *Central R.R. Co. of N.J.*, 264 F. Supp. 551 (E.D. Pa.), reversed, 399 F. 2d 825 (C.A. 3), certiorari denied, 393 U.S. 1023. The Commission's brief as *amicus curiae* in the district court in *Clemens* is reprinted in App. I, at 164–175.

only for violation of the Interstate Commerce Act and Commission orders.

This is not to say that the Commission had no power to adopt further conditions under Section 5(2)(b) of the Act, 49 U.S.C. 5(2)(b), which requires as a prerequisite to Commission approval that, subject to such terms and conditions as the Commission shall find to be "just and reasonable," the proposed transaction will be "consistent with the public interest." Although the 1962 agreement relieved the Commission of any duty to act under Section 5(2)(f), the Commission retained, and still retains under Section 5(9) of the Act, 49 U.S.C. 5(9),[41] the power to supplement the protection afforded under Section 5(2)(f).[42] Indeed, in the complete absence of Section 5(2)(f), the Commission would have discretionary authority to protect rail labor;[43] Section 5(2)(f) does not limit the Commission's authority to grant greater protec-

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[41] See *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 172, n. 2.

[42] Compare *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, 544:

> The last sentence of Section 5(2)(f) of the act provides that, notwithstanding any other provisions of the act, employee protection may be established by agreement between a railroad and the unions representing its employees. Consequently, except to find, as we do, that the agreement of May 20, 1964 does not render the proposed transaction inconsistent with the public interest, we can make no requirement as to the protection of employees covered by the agreement.

See also *Great Northern Pac. & B. Lines Merger—Great Northern*, 331 I.C.C. 228, 279.

[43] *United States* v. *Lowden*, 308 U.S. 225.

tion.[44] To avoid a conflict with Section 5(2)(f), however, it is a power that must be used sparingly—for example, to condition the approval of a transaction that would otherwise be disapproved because of an element contrary to the public interest such as invidious discrimination against a class of employees. In the present case the Commission has not been requested to exercise its authority under Section 5(2)(b) to impose such additional terms. In the meantime the rights of employees covered by the agreements here, including plaintiffs, flow from the collective agreements and not from any order of the Commission under Section 5(2)(f).

Since plaintiffs' rights to protection derive from the 1962 and other private agreements, they could not seek damages against the carrier for an alleged violation of a Commission order. The district court therefore did not have jurisdiction of plaintiffs' action under 49 U.S.C. 8 and 9.

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[44] *Railway Labor Assn.* v. *United States*, 339 U.S. 142.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it held the district court had jurisdiction under the Interstate Commerce Act.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-97.

NORFOLK AND WESTERN RAILWAY COMPANY,

Petitioner,

vs.

RICHARD NEMITZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

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Movant is the duly accredited successor in interest of the Brotherhood of Railroad Trainmen, the duly accredited representative of the respondent-trainmen at the time of the events which gave rise to this dispute. Movant represents approximately 192,000 rail employees in the United States and Canada.

Brotherhood of Railroad Trainmen was made a Third Party Defendant in this cause by virtue of a Third Party Complaint filed against it by the Norfolk & Western Railway Company. However, none of the issues raised by said Third Party Complaint have been determined by the courts below. Movant believes that there are facts and questions of law presented on the evidence of record which transcend the interests of either the petitioner or the respondent in this dispute, and which bear directly on vital

interests of a substantial number of the 192,000 rail employees represented by the United Transportation Union. These facts and questions of law include the following:

(1) Prior to approval of rail consolidations, what are the duties and responsibilities of the Interstate Commerce Commission with respect to employee protection, in a case where employee protective terms have been agreed upon by railroad and employee representatives pursuant to the third sentence of 49 U.S.C. Section 5(2)(f)?

(2) To what extent may rail unions rely upon the proviso in 49 U.S.C. Section 5(11) exempting parties to rail consolidations from restraints of Federal Law, including the Railway Labor Act, in a case where employee protection stems from an agreement made pursuant to the third sentence of Section 5(2)(f)?

(3) May a rail union resort to its self-help remedy, namely, a strike, in a case where a railroad attempts to change the terms of a pre-merger agreement so as to reduce employee protection under that agreement?

(4) Even if it is assumed that the Interstate Commerce Commission need not review the adequacy of a pre-merger agreement respecting employee conditions, entered into pursuant to the third sentence of 49 U.S.C. Section 5(2)(f), does said pre-merger agreement, nevertheless, become part of the Commission's order of approval by operation of law?

Movant believes that the interests of the United Transportation Union in the disposition of the questions raised in this suit is not identical with that of either petitioner or respondent; that UTU's interest in these questions is relevant to the disposition of this case for the reason that the case presents questions of fact and law which are likely to bear upon enforcement of past and future

rail consolidations affecting vital interests of many of the 192,000 rail employees represented by movant; that UTU's views should be considered if these vital questions of law and fact are to be fully and adequately presented to the Court.

Movant has been unable to obtain written consent of all parties to the filing by it of a brief as amicus curiae.

WHEREFORE, movant respectfully prays for an order of the Court granting it leave to file a brief as amicus curiae.

Respectfully submitted,

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SUPREME COURT, U. S.

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IV. The trainmen are not barred from suing because of the exhaustion of remedies doctrine because (A) they, in fact, exhausted every adequate remedy available to them; (B) the arbitration clause in question was optional, and since neither N&W nor the union invoked arbitration, that remedy was not mandatory; and (C) the doctrine of exhaustion of remedies should have no application in a suit by adversely affected railroad employees for benefits conferred under 49 U.S.C. Sec. 5(2)(f) ---------- 87

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In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-97.

NORFOLK AND WESTERN RAILWAY COMPANY,

Petitioner,

vs.

RICHARD NEMITZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS.

QUESTIONS PRESENTED.

1. Does an agreement between a railroad and union respecting employee protection made pursuant to the third sentence of Section 5(2)(f) of the Interstate Commerce Act relieve the Commission of any responsibility for assuring employee protection under the first two sentences of Section 5(2)(f)?

2. Does a post-merger collective agreement respecting employee merger protection which abrogates merger benefits collectively agreed upon prior to the consummation of the merger in question, violate the provisions of 49 U.S.C. Sections 5(2)(f), 8 and 9 so as to give rise to a cause of action under those Sections, even if it is assumed that the Commission made no provision for employee protection in its order of approval?

3. Are adversely affected employees, who for nearly three years have unsuccessfully attempted use of their contract remedy, barred from suing under 49 U.S.C. Sections 5(2)(f), 8, and 9 where their contract remedy is an arbitration clause which provides that disputes over matters of interpretation or application of the contract "may" be submitted to arbitration by the parties to the contract?

STATEMENT OF THE CASE.

1. Pre-merger Stage.

On October 16, 1964 the New York, Chicago and St. Louis Railroad (Nickel Plate) was merged into the Norfolk and Western Railway Company (N&W) with the N&W as the surviving entity. The transaction involved the assumption of control of several smaller lines by the combined company. Among these was the so-called Sandusky Line from Columbus, Ohio, to Sandusky, Ohio, purchased from the connecting railroad which was a subsidiary of the Pennsylvania Railroad (Pennsy). This dispute stems from the effect which the purchase of the Sandusky Line had upon certain employees of that line.

The N&W was desirous of obtaining the Sandusky Line since it provided a much needed connection between the existing N&W terminal at Columbus and the Nickel Plate's main line and principal yard at Bellevue, Ohio. Additionally, the acquisition of the Sandusky Line enabled the N&W, a primary coal hauling carrier, to extend its line to the Port of Sandusky giving it a single line capability from mine to shipping point thereby obviating the need for revenue sharing.* Joint Exhibit 6, pp. 25-26, 28.

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* Prior to 1964 N&W had used the Sandusky Line for transporting coal to the Port of Sandusky. In 1960, for example, N&W had hauled approximately 2.3 million tons over the Sandusky Line. Joint Exhibit 6, A. pp. 25-26.

Appellees are railroad trainmen who prior to October 16, 1964, were employees of the Sandusky Line. The Sandusky Line, although legally a separate entity, had been operated, prior to October 16, 1964, as a part of the Toledo Division of the Pennsy. The Sandusky Line, while carrying a large amount of agricultural products and general merchandise, was heavily utilized for moving coal to Pennsy's coal docks at Sandusky. When the winter freeze prevented navigation on Lake Erie, employment opportunities at Sandusky for more junior employees would diminish. When this occurred, those unable to hold jobs at Sandusky would exercise their seniority at other points in the Pennsy's Toledo Division. In this way the more junior trainmen were able to maintain their homes at Sandusky and remain employed throughout the year. The most adverse effect of the merger on the trainmen's employment situation at Sandusky was the fact that it split off the Sandusky Line from the remainder of their former seniority district thereby eliminating any chance for those who couldn't hold winter jobs at Sandusky to work elsewhere. For this reason, the conditions for employee protection in the Interstate Commerce Commission's order authorizing this merger were critically important to these more junior trainmen. The approach which the Interstate Commerce Commission took with respect to protecting employees affected by the merger was summarized by the Hearing Examiner as follows:

> "Norfolk & Western has entered into an agreement with 19 of the principal labor organizations, members of the Railway Labor Executives' Association, for the protection of employees of Norfolk & Western, Nickel Plate and Wabash, as well as persons employed on the Sandusky Line of Pennsylvania, represented by these organizations. This agreement, which provides for the assumption by Norfolk &

> Western of all outstanding labor contracts, schedules and agreements of Nickel Plate and Wabash, as well as those having application on the Sandusky Line, basically requires that job eliminations as a result of the unification be accomplished only through normal attrition. Under its terms Norfolk & Western agrees to take into its employment, upon consummation of the merger, lease and purchase, *all employees of the lines involved with the guarantee that they will not be adversely affected in their employment as a result of the proposed transactions or for any reason other than furloughs due to seasonal requirements or a decline in volume of traffic or revenue.*" (A. 196.)

The agreement referred to by the Examiner is before the Court as Joint Exhibits 1 through 4 (A. 60-80). This agreement between N&W and the unions was signed on April 16, 1962, and was effective according to its terms on January 10, 1962, but did not actually go into effect until October 16, 1964, the date the merger was consummated. (This agreement will be referred to herein, for sake of clarity, as the "pre-merger agreement.") As noted by the Hearing Examiner, this pre-merger agreement is an attrition type agreement whereby "N&W agrees to take into its employment, upon consummation of the merger, lease, and purchase, all employees of the lines involved *with the guarantee that they will not be adversely affected in their employment as a result of the proposed transaction* or for any reason other than furloughs due to seasonal requirements or a decline in volume of traffic or revenue." *

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* The Hearing Examiner made these findings:

"*Effect upon employees*:—Based upon studies made on the Norfolk & Western, Nickel Plate and Wabash for the 5-year period 1956 through 1960 respecting the usual turn-

(Continued on following page)

In noting that the agreement between the railroad and unions guaranteed employees of the lines involved that "they will not be adversely affected in their employment as a result of the proposed transactions," the Interstate Commerce Commission was referring to the language in the pre-merger agreement which states "* * * that none of such employees shall be deprived of employment or placed in a worse position with respect to *compensation at any time during such employment* except that Norfolk & Western shall not be required to provide *employment* to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition * * *" (A. 67). The method for determining the amount of compensation protection due adversely affected employees was set forth in the pre-merger agreement in Joint Exhibit 4 and basically provided for determination of the "average monthly compensation" of the employee for the last 12 months before the merger in which he performed service and supplementing monthly earnings each month to reach that amount (A. 77-78). The Commission found that these agreements satisfied the requirements of 49 U.S.C. Sec. 5(2)(f) and stated in its report:

(*Continued from preceding page*)

over in employment by reason of retirements, resignations, deaths and dismissals for cause, it appears that the proposed merger, lease and purchase would have little or no adverse effect on the carriers' employees. The studies reveal that the turnover, termed 'normal attrition,' averaged 4,314 employees annually for the 5-year period. Based upon that average and the plan of operation to be undertaken by the new system, applicants expect that substantially more jobs will become available on the combined system within one year after the unification than the net number of jobs expected to be eliminated as a result thereof." (Joint Exhibit 6, pp. 32-33).

> "It was stipulated that under any report and order approving the proposed merger, lease and purchase it may be considered that these agreements were made pursuant to and in conformity with section 5(2)(f) of the act for the protection of the covered employees." (A. 197.)

Having found the pre-merger agreements in conformity with Sec. 5(2)(f), the Commission made its authorization "subject to such agreements" 324 I.C.C. at 50. The only qualifications, so far as pertinent to this cause, which the pre-merger agreement placed upon the guarantee that *Sandusky Line employees* who accepted N&W employment would not be "placed in a worse position with respect to *compensation*" at any time during N&W employment, was the provision that "Norfolk and Western shall *not be required to provide employment* to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition." *

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* Neither the trainmen nor their union has ever claimed that this agreement guaranteed them "employment" up to the time worked on the Sandusky Line prior to the merger. They have sought only the compensation protection promised. Regarding this part of Section 3 the District Court stated:

> "This Court is not unaware that the language of Joint Exhibit 1 says that employees shall not be placed in a worse position with respect to their employment except due to furloughs on account of seasonal requirements or decline in traffic or revenue, and that the language of Joint Exhibit 1 (p. 9) clearly differentiates between employment and compensation in another paragraph of the same section. The Court, however, will construe this in the light which provides the least coverage, noting that the language of 49 U.S.C. Sec. 5(2)(f) only speaks of employment but the term as therein used has been used to cover both employment and compensation. While this construc-

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While *Sandusky Line employees* are guaranteed protection up to their pre-merger "average monthly compensation," less protection is offered to *former Pennsy employees whose employment connection was not with the Sandusky Line.* Concerning Pennsylvania employees who elect to become N&W employees as a result of being displaced by a Sandusky Line employee who elects to move to Toledo, Ohio and maintain his seniority on the remainder of the Pennsy's Toledo Division, the pre-merger agreement provides:

> "* * * In the event any such employee (Sandusky Line employee) elects not to accept such employment and in lieu thereof exercises employment rights on the Pennsylvania Railroad, Norfolk & Western agrees to offer employment to the employee of the Pennsylvania Railroad ultimately displaced by the return of said employee, who elects to accept such employment. Pennsylvania Railroad employees accepting such employment shall be entitled to all the protective benefits of this Section provided that Norfolk & Western shall not be required to provide *employment* or *compensation* to any such employee during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed by and paid to the Sandusky Line employee, who caused such Pennsylvania Railroad employee to be displaced, in the twelve months' period immediately preceding the effective date of said acquisition." (A. 68.)

The limitation on protection offered displaced Pennsy employees served as a protective deterrent against having

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tion results in an inconsistency in the use of terms within Joint Exhibit 1, it is not the Court's intention that this construction be considered the determination of the actual intent of the parties."

to pay compensation protection to employees whose primary working connection was with parts of Pennsy's Toledo Division outside of Sandusky, and who might elect to come over to N&W in the event Sandusky Line employees diminished their work opportunities by electing to remain with the Pennsy. The net effect was to encourage Sandusky Line employees—those whose homes were in Sandusky and whose primary employment connection was with the Sandusky Line—to accept N&W employment and to *discourage* other of Pennsy's Toledo Division employees from accepting N&W employment.*

As will be demonstrated below, the distinction made in the pre-merger agreement between protection offered Sandusky Line employees and that offered displaced Pennsy employees is critically important in understanding the events which gave rise to this dispute. This distinction is more easily grasped when the language in the pre-merger agreements respecting these two categories of employees is jutaposed for purposes of comparison.**

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* Respondents know of no case where a Sandusky Line employee displaced a Pennsy employee, so that this provision of Section 3, which ostensibly served its purpose, is not involved in this dispute.

** Protection Promised	Protection Promised
Sandusky Line Employees who elect N&W employment	Pennsy Employees displaced by Sandusky Line Employees who elect to remain with Pennsy.
"* * * all employees * * * who during such period have exercised employment rights on said Sandusky Line * * * (shall not) * * * be deprived of *employment* or placed in a worse position with respect to *compensation* at any time during such employment except that Norfolk & Western shall not	"* * * In the event any such (Sandusky Line) employee elects not to accept such employment and in lieu thereof exercises employment rights on the Pennsylvania Railroad, Norfolk & Western agrees to offer employment to the employee of the Pennsylvania Railroad ultimately displaced

(Continued on following page)

Fifteen days before the effective date of the merger, Sandusky Line employees received written notification (A. 142-143) which informed them that:

> "* * * effective October 16, 1964 . . . the Norfolk and Western Railway Company will purchase the Sandusky Line and proposes to establish the following runs on that line * * *.
>
> "To man the above runs, the Norfolk and Western Railway Company hereby offers to take into its employment employees of the Pennsylvania Railroad who were eligible under the terms and provisions of Section 3 of the 'Agreement for protection of employees in event of approval of merger and related applications' . . . dated January 10, 1962, and who elect to accept such employment under the terms and provisions of Section 3 of the above agreement."

A copy of Section 3 was attached to this notice.

(*Continued from preceding page*)

Protection Promised	Protection Promised
be required to provide *employment* to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition."	by the return of said employee, who elects to accept such employment. Pennsylvania Railroad employees accepting such employment shall be entitled to all the protective benefits of this Section provided that Norfolk & Western shall not be required to provide *employment* or *compensation* to any such employee during any year, commencing on the effective date of such acquisition, of greater *duration* or *amount* than was performed by and paid to the Sandusky Line employee, who caused such Pennsylvania Railroad employee to be displaced, in the twelve months' period immediately preceding the effective date of said acquisition."

To the more senior men who could anticipate holding jobs at Sandusky even during the transitional period, the merger simply meant doing the same work for a different employer. To the more junior employees—those who had been unable to hold jobs at Sandusky during the winter decline in business—this notice was a promise of better things to come. As noted above, Section 3 of the pre-merger agreement, which was attached to these notices, guaranteed these trainmen that although "Norfolk and Western shall not be required to provide **employment** to any such employee during any year . . . of greater duration than such employee enjoyed on said line the twelve months' period immediately preceding the effective date of said acquisition," nonetheless, N&W explicitly promised that "none of such employees shall be . . . placed in a worse position with respect to **compensation** *at any time during such employment* * * *." This promise meant that the trainmen, rather than uproot their families, could remain at Sandusky with their compensation protected in the event they were unable to hold a job during the transitional period of N&W's takeover of operations at Sandusky.

Based upon these promises, some 96 trainmen elected to accept employment with N&W. Of this 96, approximately one-half were men who had made their homes at or near Sandusky, and the remainder were men who had worked on the Sandusky Line with Columbus, Ohio, as their home terminal. Of the approximately 50 men who made their homes at Sandusky, approximately 25 were junior men who had been required to work during the off season on other parts of the Toledo Division, *particularly during the year immediately preceding the merger during which business on the Sandusky Line had de-*

creased substantially (A. 211). These 25 trainmen are the plaintiffs in this action.

2. Post-merger Stage.

Unfortunately, the transitional period at Sandusky lasted for nearly a year and a half. During this 18 month period these 25 trainmen were unable to hold jobs at Sandusky. This dispute involves the so far unsuccessful attempt by these 25 junior trainmen to receive the compensation protection promised them under the pre-merger agreement. What follows is an outline of the facts which led to the trainmen's claim being placed in litigation.

For over a year after the merger, and while their financial situation worsened, these trainmen were not paid a single cent by way of promised benefits. N&W gave as an excuse for this delay, the fact that it was having difficulty in obtaining the earnings records from Pennsy necessary to calculate benefits due, although it admitted that during the months prior to the merger it did not take a single step to obtain these earnings records from Pennsy so as to be prepared to deal with these benefit claims during the immediate post-merger period when these benefits would be most needed by adversely affected employees (A. 209, 210).

As the financial position of the junior trainmen worsened, pressure mounted within their union, Brotherhood of Railroad Trainmen, for relief. As months passed and N&W continued to excuse its failure to pay benefits, what occurred is well summarized in a letter of Union General Chairman McNeel, included as part of N&W's Exhibit P at A. 178-179:

> "On July 13, 1965, reasoning that more than a reasonable time had elapsed to enable the Norfolk and

Western Railway Company to arrive at the proper figure to be used for the Sandusky trainmen under Section 3, we wrote to Mr. Frank Johnson, Manager-Personnel, Norfolk and Western Railway Company, who had, at that time been designated to handle this, urging him to complete the Test Period Earnings List without further delay. Mr. Johnson answered our letter advising us that the Norfolk and Western Railway Company still did not have the Sandusky Earnings separated and when the correct figures were available, he would advise us.

"Again, on September 3, 1965, having had no further word from Mr. Johnson on this subject, we again wrote to him and advised him that we had no alternative but to invoke Section 1 (d) of the January 10, 1962, Agreement which reads as follows: (arbitration clause of the agreement quoted here)

* * * * *

"On October 5, 1965, with still no word from Mr. Johnson, we wrote to President C. Luna (Union National President Charles Luna) outlining our problem in this matter, advising him of our desire to invoke Section 1 (d) and requesting that Brother J. M. King, Vice President, Brotherhood of Railroad Trainmen, be assigned as our member of the Arbitration Commitee.

"In a letter dated October 7, 1965, President C. Luna agreed with our opinion and suggested the proper measures to take to bring this matter to Arbitration as provided in Section 1 (d) above quoted.

"In a letter dated October 8, 1965, we wrote to Mr. H. C. Wyatt in compliance with Brother C. Luna's instructions. Mr. Wyatt, Senior Vice President, Norfolk and Western Railway Company answered our letter and notified us that Mr. Frank Johnson would be their member of the Arbitration Committee.

"Before this matter could be brought to arbitration, a conference was arranged in Mr. Johnson's office in Cleveland and Implementing Agreement 1-A was

signed as well as the Letter of Understanding which is herein being appealed."

The Letter of Understanding and Implementing Agreement 1-A referred to are before the Court as Joint Exhibits 9 and 10. (These exhibits will be referred to herein as the "post-merger agreements.") It is N&W's position that these post-merger agreements were intended to limit these junior trainmen's compensation protection to their earnings on the Sandusky Line during the 12 months before the merger, divided by 12, regardless of *how many months* such employee had actually worked at Sandusky during that period. For example, an employee who worked only 4 months at Sandusky during this 12 months because of slackness in Pennsy's business during that period, and who averaged $400.00 a month would have his compensation protected *only if he earned less than $100.00* (i.e. the quotient arrived at by dividing $1,200.00, his total test period earnings, by 12).*

Briefly, it is the trainmen's position that the post-merger agreements, to the extent they were intended to apply to the junior trainmen at all, were intended as merely a temporary expedient aimed at palliating their dire post-merger financial position until N&W had obtained complete earnings records from Pennsy; that while their union may have acceded to N&W's proposal that protective benefits would be calculated based upon Sandusky earnings, the post-merger agreements were never intended to derogate the principle embodied in the pre-merger agreements that protective benefits would be paid up to a genuine "average monthly compensation," namely, a quotient reflecting what an employee typically earned

* That this harsh result was fully understood by N&W is reflected by the testimony of N&W's Mr. Johnson (Johnson Deposition, p. 58).

for a month's service; and that the evidence shows that no formula other than that expressed in the pre-merger agreements was ever settled upon as the means of calculating benefits due the junior trainmen who most needed post-merger compensation protection and who have never received it.

The District Court, for purposes of resolving the parties' motions for summary judgment, accepted as true N&W's position as to the intent and effect of the post-merger agreements and did not have to decide the merits of the trainmen's position. The court held that a post-merger agreement which abridges the basic merger protection afforded employees is unenforceable as a matter of law and public policy. These post-merger agreements have received considerable attention in petitioner's brief. The trainmen believe that the evidence concerning these agreements explains a great deal about the concrete realities which generated this suit and bears heavily on the questions before this Court. For these reasons a careful discussion of these agreements seems justified.

The post-merger agreements were signed by the union's General Chairman, J. F. McNeel. The General Chairman's office stands at an intermediate level between the national union headquarters and the local union, and is the regional arm of the union which handles most business on behalf of its members which cannot be resolved locally. It was this intermediate union officer, whose office is located at Columbus, Ohio, who signed the post-merger agreements represented by Exhibits 9 and 10 (A. 85-91). The Union General Chairman's understanding with respect to the post-merger agreements was expressed in N&W's Exhibit P at A. 140 where he described the intended effect of the post-merger agreements regarding the claims of the junior trainmen as follows:

"Upon receipt of the Earnings Sheets furnished the Norfolk and Western Railroad Company, we compiled separate Earnings Sheets using 75% of each man's total earnings on the Pennsylvania Railroad Company in the twelve months prior to the effective date of the merger and purchase. All of this information was then furnished to the interested local chairmen and lodge secretaries with the explanation that *this was only a temporary understanding and was made in order to help the Sandusky trainmen who were in immediate need of funds due to being on furlough status.*

"We reasoned that the trainmen presently working on this district were generally earning in excess of their Certified Protection Earnings and were in no need of financial assistance." (Emphasis ours).

McNeel's reference to "the trainmen presently working on the district," of course, describes the more senior trainmen who elected N&W employment and who are not plaintiffs in this action. The Union General Chairman thus understood that the post-merger agreements had a dual purpose; while they permitted the immediate determination of whatever limited benefits were due the more senior trainmen, it also permitted payment of *temporary relief based upon 75% of total Toledo Division earnings for junior trainmen* until Sandusky earnings could be segregated and a final formula worked out *under the pre-merger agreement* for calculating benefits due based upon Sandusky Line earnings. This arrangement admittedly involved two concessions to N&W on the part of the General Chairman. (1) It meant a slight reduction in benefits for those senior men who, although they performed service in Sandusky during each of the 12 months before the merger, also performed some road service outside of the Sandusky Line. The reason for this slight

reduction is explained below.* (2) It meant that there would be further delay before necessary earnings records could be obtained in order to determine a workable formula under the pre-merger agreements for calculating the benefits due the junior trainmen.** As tortuous and

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* The October 25, 1965, agreements provided that if temporary payments were greater than 100% Sandusky earnings, overpayments would be refunded. This apparent paradox, that is the possibility that 100% Sandusky earnings would be less than the temporary 75% Pennsylvania earnings was explained by Local Chairman Fitz in his deposition (Fitz deposition pp. 92-94). That Fitz's explanation was correct, was categorically admitted by N&W's Fred Yancey (Yancey deposition pp. 65-67). What this testimony shows is that as far as men with a full 12 months earnings at Sandusky were concerned it was agreed that their 12 months Sandusky earnings divided by 12 would be used in calculating their average monthly compensation and that any road assignments throughout the Toledo Division during that period would not be included. If a senior employee's road assignments amounted to more than 25% of his total earnings, it would mean that when Sandusky earnings records were obtained these men would have to repay N&W to the extent that 75% Toledo Division earnings exceeded total Sandusky Line earnings. While the men with full Sandusky earnings are not plaintiffs in this action, it is interesting to note that the General Chairman made a substantial concession to N&W by agreeing that only Sandusky earnings for the last 12 months during which services were performed at Sandusky rather than the entire Toledo Division would be used with respect to these senior men.

** Several possible formulas were discussed: (1) earnings for the last 12 months of services performed on the entire Toledo Division divided by 12; (2) earnings for the last 12 months in which services were performed at Sandusky, even if this required going back well beyond the year prior to the merger to obtain 12 months of compensated service, divided by 12; (3) earnings at Sandusky divided by the number of months in which service at Sandusky was actually performed. Obviously any one of these formulas would have provided a level of compensation protection approximating "average monthly earnings" before the merger. Local Chairman Fitz's position was that the third alternative, that is earnings divided by the months actually worked, would provide the most expeditious means in settling this matter in view of the difficulty in getting earnings records beyond the 12 months before the merger (Fitz deposition pp. 56,

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complicated as the foregoing description of the purposes and intent of the post-merger agreements may seem, the evidence of record as to what occurred *after* these agreements were executed strongly supports the correctness of the trainmen's position. A brief review of this evidence follows.

On February 23, 1966, shortly after N&W indicated that it would interpret the post-merger agreements so as to restrict the junior trainmen's benefits to Sandusky Line earnings during the 12 months before the merger divided by 12, regardless of how few months a trainman had actually worked at Sandusky during that 12 month period, Union Vice President Montgomery wrote N&W Vice President Wyatt in pertinent part as follows:

> "Please refer to your letter addressed to me under date of April 23, 1962, confirming our discussions in Washington, D.C., on that date, concerning the proposed agreement for protection of employees in event of approval of merger and related applications filed by the Norfolk and Western Railway Company and other carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514, and I would like to deal with a pertinent part of that letter found on page 3, which is identified as and titled VIII, Section 3.
>
> "As you will recall, Vice President J. M. King accompanied me at this meeting and considerable time was spent in discussing the district from which the men who would cover the new Norfolk and Western Railway you propose to buy from the Pennsylvania Railroad, from Sandusky to Columbus, Ohio, which you advise will serve as the connecting link

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(*Continued from preceding page*)

57). However, as the record shows, no agreement as to a formula under the January 10, 1962, agreements with respect to the plaintiffs' claims was ever agreed upon.

between the Norfolk and Western at Columbus and the Nickel Plate at Bellevue, Ohio.

"If my memory serves me correctly, you had a map of the proposed system on the wall of your private car and in discussion of the particular phase of your merger, I pointed out to you that the seniority district for these men encompassed Sandusky, Toledo and Columbus and advised, when we were talking, about how the men would make the transfer from Pennsylvania employment to N&W employment why it would be necessary to place bulletins at all three points so that the 50 senior men would have first opportunity for their job in seniority order on the Norfolk and Western.

"I am now advised that your representatives are holding that the area from Sandusky to Columbus comprises the seniority district, contrary to my understanding with you on April 23, 1962.

"I am told that the seniority district for the men who took employment with your merged railroad over the so-called Scioto Division *held seniority on a common seniority roster on the Pennsylvania Railroad Toledo Division, Lake Region, and exercised seniority indiscriminately on the former Sandusky line of the Toledo Division, Toledo, Ohio-yard and road, Detroit-yard and Columbus-road, and in exercising their seniority their position on the seniority roster of this particular district was given full recognition.*

"It was not my understanding, when we met in 1962, that these men would be deprived of any of the benefits contained in this protective agreement when adversely affected, *but we now find that you are holding that employees from this common seniority board are being afforded protection in ratio to their earnings on the so-called Sandusky line.*"

Union Vice President Montgomery's letter apparently had some effect. Shortly after N&W made the "temporary"

payments as called for by the "understanding" of October 25, 1965, N&W Vice President Wyatt wrote Union General Chairman McNeel in a letter dated April, 1966, as follows:

> "Please refer to our conference in your office at Columbus, Ohio, on March 31, 1966, at which were also present Messrs. P. V. Hemmer, J. E. Fitz and C. R. Mick of your Committee, when the claims of various Sandusky District Trainmen and Conductors, allegedly adversely affected by the merger under the provisions of Section 3 of the Agreement of January 10, 1962, were considered.
>
> * * * * *
>
> "It was further understood and agreed that this settlement is made without prejudice to the position of either party and with reservations made by members of your Committee providing for further consideration of certain of these and several additional claims of record covering the above-mentioned period." (A. 198).

To this letter Union Chairman McNeel responded, in pertinent part by letter dated April 11, 1966:

> "As stated above, we are agreeable to accepting the amounts listed on the attached list, *until this matter is finally resolved as the claimants are in dire need of the money. We do anticipate further handling of this matter,* as soon as prior commitments will allow. We will advise you of what steps we desire at some future date." (A. 200).

Union General Chairman McNeel's understanding as to the meaning of this letter exchange is summarized by McNeel in N&W's Exhibit P at A. 141 as follows:

> "On April 7, 1966, Mr. Wyatt informed us that he was agreeable to paying these claims in accordance with the understanding of the Letter of October 25, 1965, and *with the realization that this settlement*

would be without prejudice to our respective positions on these and other claims.

"We replied to Mr. Wyatt by letter dated April 11, 1966, and clearly set forth our position on these claims.

"*Realizing that this matter is far from solved,* we wrote Brother J. M. King this same date requesting that he meet with us to discuss this matter with the thought that such a meeting would be of great help in *devising a method to pursue in order to arrive at a final fair settlement of this problem.* Due to Brother King's other duties, this meeting has never been held."

Shortly after this exchange of letters in June of 1966, Union Vice President King and General Committee Secretary Hemmer met with N&W Vice President Noell at Roanoke and specifically raised the same objection to N&W's position which Union Vice President Montgomery's letter of February 23, 1966, had raised. Mr. Noell's recollections of this meeting were elicited on cross-examination as follows:

"Q. Anything you want to include, of course, can be included in Mr. Curphey's redirect examination. My question to you, Mr. Noell, is, in view of your testimony that you were acquainted with this letter [Union Vice President Montgomery's letter of February 23, 1966, quoted at pp. 17-18 above], is it not a fact that you were aware, during the time that you were dealing with this problem, that at least Mr. McNeel's superior was of the position that those men with less than full one hundred percent Sandusky Line earnings would be entitled to protective benefits?

A. I recall seeing this letter, which is dated in 1966. If I recall my earlier testimony, I said that at a certain period—or during the negotiations I had not heard Mr. McNeel take any position that anything other than Section 3 applied to the Sandusky District employees.

Q. Isn't it a fact that some time prior to January 28—between January 1st and that date in June that Mr. Hemmer and Mr. King both met with you and made their position clear that whatever formula was eventually worked out for those men with less than one hundred percent Sandusky Line earnings under the January 10, 1962 agreement, would have to include consideration for a full twelve months in which these men performed service, in accordance with the Memorandum of Understanding attached to the January 10, 1962 agreement.

A. Messrs. King and Hemmer came to Roanoke some time in June, 1966—not prior to this time—and that's when they made—only really raised the question, and I told them that Section 3 applied to the people on the Sandusky District—and this was made clear to everyone during the earlier negotiations, and was also included in our offer of employment to the people on the former Pennsylvania Railroad.

Q. I see. So that I am perfectly clear, then, Mr. Noell, what you have just told us, you were aware of Montgomery's letter before King and Hemmer came to Roanoke in June of 1966?

A. That is right.

Q. And at the time King and Hemmer came here they raised the question.

A. They just raised the question."

In July of 1966, Local Chairman Fitz appealed to the Union's National Board of Appeals. It is N&W's position that the Union Board of Appeals completely contradicted the position of Union Vice Presidents King and Montgomery and supported the position of N&W with respect to the intent of the post-merger agreements (Petitioner's Brief pp. 47-51). A close look at the Union Board of Appeals' decision, however, reflects that if that decision, in fact, rejected the trainmen's position, it did so as a result of a patently mistaken reading of the pre-merger agreements. Faced with Local Chairman Fitz's concern that the post-

merger agreements may have prejudiced the junior trainmen's claims to long awaited compensation protection, the Union Board of Appeals seems to reject the trainmen's argument, as expressed by their local chairman, that they are entitled to compensation protection up to a genuine "average monthly compensation" as called for by the pre-merger agreement. In this regard the Board of Appeals stated:

> "We feel that the above effectively answers the latest contention of the appellant in this instant case concerning the method of arriving at the test period and the average monthly compensation as these very items are spelled out in the memorandum cited above.
>
> "Section 3 of title VIII of the 'Agreement Effective January 10, 1962, and Attached Memoranda of Understanding For Protection of Employees in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Dockets Nos. 21510, 21511, 21512, 21513 and 21514,' known as Exhibits 'B' and 'E,' among other things, provides for employment or compensation to protected or adversely affected employees but with certain strings attached, to wit: '* * * *Norfolk and Western shall not be required to provide employment or compensation to any such employee during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed by and paid for to the Sandusky Line employee* * * *.'" (A. 148).

Of critical importance, however, is the fact that the Board of Appeals quotes that *part of Section 3 of the pre-merger agreement which applies to Pennsy employees displaced by Sandusky Line employees choosing to remain with the Pennsy and who because they were displaced might decide to elect N&W employment.* None of the plaintiffs-trainmen, however, are displaced Pennsy em-

ployees. They are *all* Sandusky Line employees who, as set forth above, were explicitly promised by Section 3 compensation protection up to an amount equal to *12 months of compensated service divided by 12.* Unfortunately, the signatures to the Board's decision, which is before the court as N&W's exhibit P, are "illegible" (A. 150) so that it is not clear from the record who the union representatives were who sat on the Appeals Board. It is clear, however, that the Union Board quoted a patently inapplicable part of the pre-merger agreement in apparently rejecting Local Chairman Fitz's appeal. It is this part of the Board's decision upon which N&W heavily relies to support its position that the Union agreed with the railroad's position regarding the intent of the post-merger agreements and rejected that of the trainmen (Petitioner's Brief, pp. 47 to 52).

On the other hand, the Union Appeals Board seems to support the position of the trainmen in that portion of the decision which the trainmen believe is the real gist of its ruling. The Board concluded its decision as follows:

> "Still to be resolved is the propriety of the Letter of Understanding of October 25, 1965. If Section 3 of the January 10, 1962, Agreement is controlling in the instant case, and we believe it is, then there is nothing wrong with the Letter of Understanding. It does not conflict in any way with the controlling docket which spells out the protection features of adversely affected employees, because the "Understanding" merely provides for monetary help for the distressed membership of up to 75% of their entitlement pending the certification and payment of the final figures in full settlement.
>
> "In the letter and attachments submitted to us after the oral hearings was concluded, we can find no fresh evidence or argument that was not thoroughly explored during the hearing. We do note, as a final

plea, the appellant requests relief from Implementing Agreement '1-A.'

"The Board finds no merit in this latest thesis of the appellant. We are convinced that no valid reasons have been put forth that would warrant the setting aside of either the Implementing Agreement '1-A' or the Letter of Understanding of October 25, 1965, under appeal.

"We believe that General Chairman J. F. McNeel's actions in the instant case are right, proper and just and in conformity with the controlling I.C.C. Dockets that appear in Exhibits 'B' and 'E'. Consequently, the appeal is denied." (A. 149-150).

Exhibits "B" and "E" referred to by the Board were those portions of the pre-merger agreement which promised the Sandusky Line *employees that they would not be placed in a worse position as to compensation by the merger* (Exhibit "B") and which contained the *requirement that an employee's "average monthly compensation" be based upon 12 months in which he performed service divided by 12* (Exhibit "E").* In other words, the Board of Appeals here seems to recognize the fact that the post-merger agreements leave unsettled the problem of working out a formula under the pre-merger agreements for junior trainmen once earnings records are finally available.** It also approves the Union General Chairman's making of a "temporary agreement" as to the junior trainmen's claims "because the 'Understanding' merely provides for monetary help for the distressed membership of up to 75% of this entitlement pending the certification and payment of the final figures in full settlement."

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* Exhibit "B" is before the court as Joint Exhibit No. 1 (A. 60) and Exhibit "E" is Joint Exhibit No. 4 (A. 77).

** The several possible formulas which would probably meet the requirements of Section 3 of the pre-merger agreements fully protecting compensation are described at p. 16, *supra*.

Local Chairman Fitz, on cross-examination, explained the purpose of his appeal to the National Union Board and his understanding of the Board's ruling as follows:

"Q. Now, another appeal was taken with regard to this letter of October 25, 1965; is that right?

A. An appeal was taken not—not another. We referred to an appeal here in the record. An appeal was taken July 21, 1966—yes; that's right.

Q. That was the date of the hearing?

A. That was the date of the hearing; yes.

Q. Am I correct that you took this appeal by means of a letter under date of April 27, 1966?

A. Well, I would have to check. I thought the date was April 26; you're probably right.

Q. Very well. It was taken one or the other?

A. Yes.

Q. This would be shortly after this conference in Columbus?

A. Yes.

Q. And you were appealing from—withdraw that—your appeal related to General Chairman McNeel having entered into this Letter of Understanding of October 25, 1965; is that right?

A. That is correct.

Q. So, again, you were—as you previously explained to me, you were objecting to this understanding for temporary payments. You wanted to have the matter finally settled in accordance with the formula that you felt was applicable?

A. You're half right.

Q. Very well. Explain the other half to me.

A. Under the Constitution of the Brotherhood of Railroad Trainmen, and I might add there is one thing that the Local Chairmans become extremely aware of, as a matter of fact, that is the first thing they become aware of, is time limits.

Under our Constitution we have to be aware of it. Now, the time limit on appeals under Rule 13 is one year.

The Board convenes in January and July. I did not get by the January Board and my last shot at the appeal was the July Board of Appeals, and I appealed because I still felt that the earnings should be over the entire division, and also to protect myself under the Constitution, because I wouldn't have been able to come back and say at some future date that I took exception to this, and then the men could come and say, 'Why didn't you appeal?'

This is why I appealed under the rules of the Constitution, and I protected myself in this spot, because the next session of the Board of Appeals would have put me beyond the time limits.

Q. I see. When you use the expression, earnings over the entire division, are you using that as opposed to earnings on the Sandusky Line?

A. I am.

Q. As opposed—

A. So once again I might repeat myself here, but I think you covered this in one of your previous questions and answers, that the Norfolk and Western's position at this conference on March 31, 1966, was pretty clear in my own mind, that they were going to use a formula based upon the Sandusky Line earnings only, and this was the whole bone of contention, that they couldn't get these earnings segregated, and this was why Jack (Jack McNeel, Union General Chairman) said the reason for the Letter of Understanding, and I told Jack I understood it, and he told me that in all eventuality we would probably end up with 100 percent Toledo earnings anyways, but he was in contact with the Columbus men and there was pressure coming from all directions to get something moving.

* * * * *

Q. And I understand your appeal with regard to the October 25, 1965 Letter of Understanding was denied; is that right?

A. It was denied, and I got the message from the Board of Appeals that, 'Joe, you are an alarmist. Your

men have protection under the January, 1962 agreement, and you don't have a thing to worry about.' "

3. Events Which Precipitated Litigation

After his appeal to the Union's National Board, Local Chairman Fitz continued to pressure his General Chairman to get the N&W to move in getting the necessary earnings records from Pennsy so that a formula could finally be worked out under the pre-merger agreements which would fully compensate the junior trainmen. In response to this urging, Union General Chairman McNeel met with N&W Vice President Noell in Roanoke, Virginia, on August 3, 1966, at which meeting the problem of working out a formula for compensating the junior trainmen at Sandusky was discussed. Regarding this meeting, McNeel wrote N&W Vice President Noell, on October 12, 1966, in pertinent part as follows:

> "At our meeting on August 3, 1966 in Roanoke, we had the clear understanding that the original list furnished you by the Pennsylvania Railroad Company would be the figure acceptable to us and that we would agree to certify the figures shown on the original list, with certain corrections for Mr. K. D. White and Mr. R. S. Shilling, and the agreed upon seven percent (7%) wage increase added on.
>
> "We also agreed that *we would again meet with you and work out an acceptable formula for the remaining trainmen, who made either part of their 'test period earnings' on the Sandusky Line, and for the few men who had no 'test period earnings' on the Sandusky Line.*
>
> "We cannot understand why you would deviate from our agreed upon principles established in our August 3, 1966 meeting and attempt to use the more recent and definitely inaccurate list you mailed with your letter of October 4, 1966.

> *"Please arrange to have the list of the one hundred percent (100%) Sandusky earnings men completed so that we may certify this list and then move on to the remaining men, who do not have one hundred percent (100%) Sandusky earnings."* (A. 201-202)

Thus, the Union General Chairman's letter shows that as of October 1966, a year after the post-merger agreements were signed, discussions were still taking place regarding the matter of proper *formula* for compensating these junior trainmen who had worked less than a 12 full months at Sandusky during the year preceding the merger.

N&W took the position during discovery proceedings that *no formula was actually worked out respecting the benefits of these junior trainmen until February 20, 1967 at which time an oral agreement was allegedly reached.* This testimony given by N&W's Mr. Yancey, who was solely charged with handling the trainmen's claims (A. 209), flatly contradicts petitioner's position that the post-merger agreements of October 25, 1965, *finally resolved the formula to be used in calculating these junior trainmen's benefits by limiting their "average monthly compensation" to Sandusky earnings only during the 12 months before the merger, divided by 12, regardless of how few months* a man may have worked at Sandusky during that period (A. 220-224).

While Mr. Yancey admitted that no accredited representative of the trainmen ever signed an agreement settling the claims of these trainmen, he did assert that N&W, on March 3, 1967, had put its position in writing to Union General Chairman McNeel. It was this meeting of February 20, 1967, at Roanoke, attended by Local Chairman Fitz together with General Chairman McNeel, and the subsequent letter of March 3, 1967, which finally convinced Fitz that the only chance he had of getting effective action

was through the courts. As the Local Chairman explained it on deposition:

"Q. Did Mr. McNeel send you a copy of this letter of March 3, 1967?

A. He did; that was the impetus that sent me to an attorney, that was the thing that made me see an attorney, *because I had tried everything in my power to settle this thing reasonably*, and I asked Steve Young (United States Senator Stephen Young) anybody that would bend an ear to me to help, and I got the same advice from all the people involved, that the I.C.C. has the power invested in them to order the merger, but they do not have the power to police it, and if you have a problem, go see an attorney, so I eventually took their advice.

Q. Did you discuss with Mr. McNeel sending a reply to this letter?

A. I may have mentioned it to him in an offhand way but Jack (J. F. McNeel, Union General Chairman) looked at it and shook his head and said that this was ridiculous and that was about the extent of our conversation along those lines, I would expect.

Q. Well, you did not have any discussions about replying to it, I gather?

A. Not to my recollection. Like I say, I might have made an offhand comment on it or something like that, but at this point I was convinced there was only one way to resolve this thing properly.

Q. Well, to your knowledge, Mr. McNeel did not, in fact, reply to the letter?

A. To the best of my knowledge he didn't.

Q. Then how about the letter of April 3, 1967, with reference to the later period of December, 1965 through September, 1966; do you know whether he replied to that letter?

A. I don't know that he directly replied to it. There was—I'm not even sure of that. I can't say. I honestly don't know, Mr. Curphey.

Q. To the best of your knowledge, did Mr. McNeel have the same understanding as a result of this conference as you did?

A. Absolutely; even as late as October, 1968, he gave me correspondence to that effect, that our people were entitled to the protection of the January 10, 1962 agreement."

To fully comprehend the plight of the trainmen and what led to suit being filed, it is necessary to closely examine what N&W purported to do by its letter of March 3, 1967, which, according to N&W's Mr. Yancey, embodied an oral understanding reached on February 20, 1967 at Roanoke. In pertinent part, the March 3, 1967 letter prepared by Mr. Yancey, but signed by N&W Vice President Noell, reads:

"Please refer to our conference on February 20, 1967, at which were also present Messrs. J. E. Fitz and C. R. Mick of your Committee, when the claims of various Sandusky District Conductors and Brakemen, *allegedly adversely affected* by the merger for the period October 16, 1964, through the months of September, 1966, under the provisions of Section 3 of the Agreement of January 10, 1969, were reconsidered in the light of the adjusted 'Test Periods' as agreed to.

"We agreed to dispose of these claims as tabulated on Attachments 'A,' 'B' and 'C' herewith.

* * * * *

"Attachment 'C' shows the adjusted amount of overpayment made to twenty-five employees on April 7, 1966, under letter agreement of October 25, 1965." (A. 151).

Attachment "C" contains the names of most of the plaintiff trainmen.* The last three columns of Attach-

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* The last paragraph purports to hold the claims of four trainmen, including plaintiff R. N. Nemitz "in abeyance for further information and consideration." (A. 151)

ment "C," which are produced below,* dramatically and graphically show exactly what happened to the junior trainmen and what precipitated litigation. The first column reflects the total amount of compensation protection which N&W claimed was due each of the 25 trainmen listed as of March 3, 1967. The second column shows the amount of temporary benefits "paid April 7, 1966," under the terms of the post-merger agreements of October 25, 1965. The third column purports to show the amounts which N&W claims were overpaid to each trainman under the "temporary agreements" and which N&W claimed were to be repaid.

To grasp the net effect of this letter it is necessary to recall that N&W Vice President Wyatt had included the following proviso in the letter "Understanding" of October 25, 1965:

> "You understand that sums which individual employees may have received through the U. S. Railroad Retirement Board by way of unemployment benefits

* Name	Total Due	Paid April 7, 1966	Overpaid
W. H. Lippert, Jr.	$ —	$ 42.75	$ 42.75
W. C. Dowler	158.69	203.84	45.15
A. Caponi	137.10	729.05	591.95
H. W. Barnam, Jr.	161.50	681.34	519.84
T. O. Klein	982.08	1,438.47	456.39
E. J. Maloney	—	79.24	79.24
A. A. Mischler	741.72	1,635.84	894.12
K. H. Lippert	—	253.01	253.01
G. M. Swain	1,319.63	2,184.54	864.91
J. E. Fitz	868.73	1,558.90	690.17
M. J. Riley	1,086.96	3,452.84	2,365.88
L. J. Wuertz, Jr.	433.63	1,072.20	638.57
H. I. Fearing	—	403.77	403.77
C. L. Dowell	—	720.22	720.22
J. R. Smith	—	439.32	439.32
H. W. McCool	578.66	720.63	141.97
A. R. Hall	—	524.24	524.24
W. H. Tippie, Jr.	—	334.82	334.82
E. W. Cheek	21.34	271.70	250.36
D. L. Yost	—	297.13	297.13
J. E. Lauer	4.36	464.32	459.96
D. G. Miller	—	558.98	558.98
T. L. Townsley	—	386.63	386.63
R. G. Horne	—	292.67	292.67
D. H. Mischler	—	131.92	131.92
Total	6,494.40	18,878.37	12,383.97

for periods during which they are paid displacement allowances by the Carrier must be withheld from the displacement allowance due the employee and remitted to that Board" (C.A. 91).

The third column total of $12,383.97 then is not only the amount which N&W claimed as an overpayment under the post-merger agreements, it is also, in most cases, the amount which the trainmen *had to repay the U. S. Railroad Retirement Board*, since the meager "temporary" benefit payments, in many cases, were not more than unemployment benefits paid these men under the Railroad Retirement Act.*

In most cases, then, the "temporary" benefit payments were utterly illusory, an absolute misnomer, since by delaying payments for 18 months many trainmen were forced to seek unemployment compensation which, in turn, had to be repaid from the "temporary" benefits *once they were finally paid the paltry sums which N&W alleged were due some 18 months after the merger*. The absurdity of this result, of course, is that the trainmen were not only virtually denied compensation protection but *were required* to pay back unemployment compensation they had already received.**

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* As the Court will note, the total temporary benefit payments to the 25 trainmen listed amounted to $18,878.37 or less than $1,000.00 per man for a period covering nearly 18 months from the effective date of the merger.

** Petitioner cites the case of R. N. Nemitz at p. 44 of its brief. Nemitz is one of the four trainmen not included on Exhibit "C" as attached to the March 3, 1967 letter and whose claim was allegedly "held in abeyance for further information and consideration." (A. 151). Nemitz alleges that he was paid only $1,689.61 in benefits rather than the $10,696.87 which the pre-merger agreement called for. At that Nemitz was, ironically, far better off than the remainder of the junior trainmen who, in net effect, ended up with much less than the $1,689.61 in net benefits which Nemitz received for the 18 months period in question. As the list at p. 31 shows the closest trainman to Nemitz in net benefits was G. M. Swain at $1,319.63.

Thus, it was not until nearly three years had elapsed from the merger, during which time Local Chairman Fitz had tried every avenue open to him to get benefits promised by the pre-merger agreements paid, that Local Chairman Fitz despaired of getting effective help short of litigation; and then it was probably the announcement by N&W on March 3, 1967, that it was going to actually worsen the junior trainmen's financial difficulties by requiring employees to reimburse the Railroad Retirement Board from the meager benefits which were eventually paid which finally precipitated litigation.*

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* The effect of N&W's position on the trainmen is described by Local Chairman Fitz and shows that in some cases N&W actually took alleged reimbursements due out of the regular paychecks of the men once they *did get back to work*:

"Q. Did you tell Mr. Yancey that you would not settle on this basis?

A. I think I got a commitment out of Mr. Yancey when they started talking about taking money out of every payment. I thought I had a commitment from him that he would not try to recover anything under the Letter of Understanding until we had time to further try to resolve this thing, and he agreed—he turned right around and combined those payments, and when I got back to Sandusky I had to explain to my people why they were short $10 or $20 in their paycheck, and I couldn't explain it.

I left Roanoke with the idea that they would not touch these checks." (Fitz deposition, p. 72).

"* * * I got McNeel to write a letter and told them that for God's sake, whatever you do, don't mess with the regular paycheck, because they went and combined this money with their regular paychecks, and then they started deducting, and they took their regular payday money away from them, and in one case this man had over $200 and some coming, and when he got the check it was for $1.56, so this was the point where I decided Roanoke and the N and W personnel down there didn't intend to deal in good faith, and I started to seek relief and some remedy, * * *" (Fitz deposition, p. 69).

SUMMARY OF ARGUMENT.

The first two sentences of Section 5(2)(f) of the Interstate Commerce Act require the Interstate Commerce Commission, as a prerequisite to approving a transaction under Section 5(2), to impose protective conditions, for the benefit of railroad employees affected by the transaction. The Supreme Court has interpreted the first and second sentences of Section 5(2)(f) as imposing a mandatory obligation upon the commission in all Section 5 transactions to "observe the provisions of the second sentence of Section 5(2)(f) as a minimum protection for employees adversely affected."

The last sentence of Section 5(2)(f) provides that "Notwithstanding any other provisions of this Act" the carrier and the representatives of the affected employees may enter into a collective bargaining agreement pertaining to the protection of the employees. Where collective terms have been agreed upon which meet the minimum protection required by Section 5(2)(f), the Commission has consistently fulfilled its mandatory duty to require a minimum level of employee protection by adopting such agreed upon terms in its order of approval. By doing so the Commission has not only acted in consonance with the scope of its duties, as defined by the Supreme Court and by past administrative practice, but has carried out the clear understanding of its duties held by both railway labor and management since the enactment of Section 5(2)(f).

In the instant case, the Commission's contention, that it did not incorporate in its order the pre-merger third sentence agreement of the parties, is contrary to the understanding of the parties themselves at the time of the transaction, and at odds with the language of the pre-merger agreements and the Commission's order. Moreover, if the

Commission did not incorporate the instant pre-merger agreement in its order by explicit adoption, that agreement was, nevertheless, included in the order by operation of law. Without incorporation of pre-merger agreements in Section 5 transactions, primary policy objectives of both the Interstate Commerce Act and the Railway Labor Act would be defeated. The legislative history of Section 5(2)(f), as well as the language of the Interstate Commerce Act, show that Congress intended that the Commission both review the adequacy of, and incorporate in its order, the terms of third sentence pre-merger agreements.

Alternatively, if the Court finds that the pre-merger agreement was not incorporated in the Commission's order, the record establishes that the N&W, after the merger, purported to make an agreement which, on its face, would destroy all meaningful compensation protection for adversely affected plaintiffs agreed upon at the pre-merger stage. Such purported agreement clearly fails to meet the requirement of Section 5(2)(f) that an agreement dealing with employee merger protection must be an "agreement pertaining to the protection of the interests" of affected employees, and is, therefore, violative of Section 5(2)(f) of the Act.

If the pre-merger agreement was incorporated in the Commission's order, the District Court had jurisdiction to enforce that order. If the pre-merger agreement was not incorporated in the order, the benefit destroying post-merger agreement violated Section 5(2)(f) and gave rise to a cause of action for damages, costs, and attorney's fees under 49 U.S.C. Sections 8 and 9.

If the pre-merger agreement was incorporated in the Commission's order, the record is clear that the post-merger agreement, on its face, abrogates employee merger protection without giving the slightest quid pro quo. The

courts below, therefore, were justified in holding that the post-merger agreement in question was unenforceable as a matter of law.

Finally, the record is overwhelmingly clear that the trainmen did everything reasonably possible to exhaust their administrative remedies. Further, unless the need for insuring prompt relief for adversely affected employees in the aftermath of rail mergers is to be disregarded, the "may" language in the arbitration clause, in a case like the instant one, should be deemed "optional" until such time as either party invokes arbitration. Since the evidence is uncontradicted that the plaintiffs attempted use of the contract remedy, and that neither the union nor the railroad effectively invoked arbitration for nearly three years, the courts below were correct in finding that the trainmen were not barred from suing by any failure to exhaust their administrative remedies.

ARGUMENT.

I. A FREELY NEGOTIATED AGREEMENT ON EMPLOYEE PROTECTION REACHED UNDER THE LAST SENTENCE OF SECTION 5(2)(f) OF THE INTERSTATE COMMERCE ACT WHICH MEETS THE MINIMUM PROTECTIVE REQUIREMENTS OF THE FIRST AND SECOND SENTENCES OF THAT SECTION BECOMES PART OF THE COMMISSION'S ORDER BY OPERATION OF LAW REGARDLESS OF WHETHER OR NOT THE COMMISSION EXPLICITLY INCORPORATES THE TERMS OF THAT AGREEMENT IN ITS ORDER.

This case raises the question of the scope of the Interstate Commerce Commission's responsibilities under Section 5(2)(f) of the Interstate Commerce Act; or more precisely, the question of whether a collective agreement on employee protective conditions reached pursuant to the last sentence of Section 5(2)(f) relieves the Commission of all responsibility under that section for assuring that a fair and equitable arrangement is reached to protect the interests of the railroad employees affected by Section 5(2)(f) transactions. The railroad, with the support of the Commission, contends that because employee protective conditions here derive from an agreement negotiated pursuant to the last sentence of Section 5(2)(f), the Commission had no responsibility to review it, did not review it, did not adopt it in its order and, hence, the District Court erred in assuming jurisdiction under 49 U.S.C. Sections 8 and 9.

The question of the scope of the Commission's duties where protective conditions are collectively agreed upon appears to be one of first impression. It comes before this Court by a tortuous route. The District Court did not have before it the question of the effect of a last sentence

collective agreement on the scope of the responsibilities of the Commission for employee protection under 49 U.S.C. Section 5(2)(f). The N&W admitted in its answer that the pre-merger agreement in question *had been incorporated in the Commission's order of approval* (A. 37). It contended, however, that the pre-merger agreement justified its position that employee merger benefits should be calculated on the basis of Sandusky Line earnings, regardless of how little monetary protection this would afford affected employees. The District Court framed the issue this way:

> "Basically, the N&W claims that it has an agreement pursuant to the last sentence of 49 U.S.C. Section 5(2)(f) providing for the determination of protective benefits on the basis of plaintiffs' Sandusky Line earnings alone. Plaintiffs, the employees represented by the Brotherhood of Railroad Trainmen, claim that they are entitled to payments based upon their earnings for the entire Toledo Division prior to the merger." (A. 49).

The District Court discerned that if N&W's position was correct, the adversely affected trainmen would be left virtually without compensation protection; that if the trainmen were to be protected to the extent of their pre-merger "average monthly compensation" for the 12 months before the merger, it would be necessary, despite the fact that N&W's acquisition split their seniority district, to determine this "average" from earnings for their entire pre-merger seniority district for this 12 months period. Notwithstanding this fact, the District Court noted that its function was not to review the Commission's order; that if "defendants position that protective benefits are to be calculated on the basis of Sandusky Line earnings alone is frozen into the I.C.C. order . . . (is correct,

this would) . . . divest this court of jurisdiction.*" (A. 52). *The court found, however, that the pre-merger agreement, in fact, "provided for determination of the average monthly compensation of the employee for the last 12 months before the merger in which he performed service and supplementing monthly earnings each month to reach that amount."* (A. 48). In light of this finding, the court described its function as requiring it to "delineate the minimal requirements of the law and the I.C.C. order in a situation where defendant's conduct with respect to protective benefits guaranteed plaintiffs has not been in compliance with the law or the I.C.C. order. But the function of the court is not to go beyond requirements of the law and the reason it finds noncompliance with the law." Regarding the language in the pre-merger agreement which seems to promise the trainmen "employment" as well as "compensation" protection (A. 67), the court said: "The court, however, will construe this *in the light which provides the least coverage*, noting that the language of 49 U.S.C. Section 5(2)(f) only speaks of employment but the term as therein used has been used to cover both employment and compensation." (A. 54).

The District Court, therefore, simply undertook to determine the minimum level of protection required by the first and second sentences of 49 U.S.C. Section 5(2)(f) *in a case where protection derived from a third sentence agreement admittedly incorporated in the Commission's order.* After a careful review of the Supreme Court's

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* The court footnoted its reason for this conclusion as follows:

> "Cases to review an I.C.C. order pursuant to 28 U.S.C. Sec. 1336 must be brought by or against the United States, 28 U.S.C. Section 2322, and must be filed within 90 days after the date the Commission order becomes final, 28 U.S.C. Sec. 1336(c)."

interpretation of the first and second sentences of Section 5(2)(f), the District Court was "compelled to the conclusion that 49 U.S.C. Section 5(2)(f) requires a wage freeze for four years after the consummation of the merger as the minimum protective benefits." (A. 51). Since the pre-merger agreement, construed most favorably to the defendant, provided for at least a four year wage freeze, and since there was no dispute that substantially less than that had been paid, the court found jurisdiction to enforce the Commission's order under 28 U.S.C. Sections 1331, 1336, 1337, 2321 and 49 U.S.C. Sections 8 and 9.

On appeal the N&W contended for the first time that the Commission had not adopted the protective conditions of the pre-merger agreement in its order; that the trainmen's rights flowed solely from collective agreements which the District Court lacked jurisdiction to enforce. The Court of Appeals rejected this contention as unsupported by the record before it and as contrary to law. It noted that incorporation was admitted in N&W's Answer; that "all interested parties entered into a 'Stipulation and Agreement'" before the Commission, which provided that the provisions of the 1962 agreement "shall be applied for the protection of the interests of the employees * * * as required by Section 5(2)(f) of the Interstate Commerce Act * * *;" "* * * that all parties understood that the provisions relating to benefits for affected employees in the 1962 agreement would be, and were, incorporated into the I.C.C. order; and that 49 U.S.C. Section 5(2)(f) imposed a duty on the Commission to assure the existence of "a fair and equitable arrangement to protect the interests of the railroad employees affected."

The Appeals Court, however, recognized that the Commission's duty was not to intrude gratuitously on

the efforts of railroad and union to achieve agreement on protective conditions, but merely to assure that the conditions were adequate within the purview of Section 5(2)(f). It thus found that "the I.C.C. first determined that the protective conditions in the 1962 agreement were adequate and then concluded that it did not deem itself compelled to elaborate on these conditions, merely stating that the conditions were subject to the order . . . . We find that the 1964 order in disclaiming the necessity for protective conditions, must be construed as meaning that such conditions need not be spelled out or elaborated in the 1964 order since they were sufficiently covered by the 1962 agreement, a construction which is consistent with the theory of incorporation as well as with the I.C.C.'s statutory duty." (A. 185-186). The Courts' conclusion respecting the incorporation question was, therefore, founded upon conclusions of both fact and law, and only tangentially and impliedly considered the effect of a third sentence Section 5(2)(f) agreement on the scope of the Commission's duties under that section.

When N&W petitioned this Court to grant certiorari, the Commission for the first time intervened as amicus curiae, and urged the granting of the writ on the grounds that the pre-merger agreements were not adopted in its order; that "for thirty years the consistent administrative interpretation of the third sentence has been that an agreement between rail labor and rail management moots the question of employee protection in a Section 5 proceedings," and, therefore, the courts below erred with respect to the scope of the commission's statutory duties.

In their briefs on the merits, N&W and the Commission have placed heavy reliance on the legislative history of Section 5(2)(f) which, it is contended, shows that congress intended to relieve the Commission of any duty to

review employees protective conditions where conditions were reached by collective agreement under the third sentence of Section 5(2)(f); that the rulings below would require the Commission to "review the adequacy of negotiated agreements" thereby intruding on traditional collective bargaining processes; and, since the "Commission did not review the (pre-merger) agreement in light of Section 5(2)(f) and did not adopt it," the District Court did not have jurisdiction of plaintiffs' action.

Apparently, therefore, the Commission's belated intervention has substituted for the question of whether the first and second sentences of 49 U.S.C. Section 5(2)(f) prescribes a minimum level of compensation, the question of whether collectively agreed upon employee conditions relieve the Commission of all responsibility for employee protection, much less for assuring the existence of a statutory minimum. It is the trainmens' contention that appellants' position is contrary to the legislative history of Section 5(2)(f) as well as administrative and judicial interpretations of that section; that this position, if adopted, would undercut compelling objectives of both the Railway Labor Act and Interstate Commerce Act; and that even if appellant's position is sustained on this narrow question, the record establishes at least one alternative basis for federal jurisdiction over this dispute, which the District Court never reached because of N&W's admission that the pre-merger agreement was incorporated in the Commission's 5(2)(f) order.

A. Section 5(2)(f) on its face, as well as the administrative and judicial interpretations of that section, reveal that this section imposes upon the commission a duty to assure that employees are at least protected to the extent of the compensatory minimum established by the first and second sentences of that section.

The trainmen agree with the Commission's implied suggestion that Mr. Justice Frankfurter's aphorism that "words acquire scope and function from the history of events which they summarize,"* seems an apt keynote in undertaking the task of determining congress' intent in enacting Section 5(2)(f). Trainmen doubt, however, that Mr. Justice Frankfurter meant to fault an approach which first looked carefully at the "words" themselves before traveling the paths of legislative history in search of "scope and function," especially where this Court has reviewed that legislative history and concluded that "it would not be productive to relate in detail the various statements offered by members of the house to explain the significance of the events outlined above. It is enough to say that they were many, sometimes ambiguous and often complicated." 336 U.S. 174, 175.

The first sentence of Section 5(2)(f) provides that "[a]s a condition of its approval [of a rail merger] * * * the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." The second sentence provides that the order of approval "shall include" certain minimum employee protective conditions—protection for at least four years against "being in a worse position with respect to their employment * * *." The third sentence—the effect of which is in question in the instant case—provides that

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* *Phelp's Dodge Corporation v. National Labor Relations Board*, 313 U.S. 177, 186.

"[n]otwithstanding any other provisions of this act, an agreement *pertaining to the protection of the interests of said employees* may hereafter be entered into" between the carrier and its employees' representatives. This Court is now asked to hold that the first and second sentences impose a duty on the Commission to assure employee protection where none is agreed upon, and provides it with a minimum standard in the exercise of this regulatory duty; and that a third sentence agreement renders the first two sentences utterly inapplicable. The trainmen submit that the wording of Section 5(2)(f) itself shows that such an interpretation is inherently incongruous and contradictory.

To begin with, it is meaningless to talk of employee protection without also talking about reasonably enforceable standards. Appellant's position apparently is that the carriers and unions are to set their own standards by determining which agreements "pertain to the protection of the interests" of employees, if indeed a proviso that vague, standing alone, can rationally be deemed a standard. At any rate, such a vague test is likely to be meaningless so far as employees most likely to need protection are concerned. If the union and railroad make an agreement which seriously a dislocated employee or employees believe does not "pertain to the protection of their interests," and if their rights stem solely from the agreement, as appellant and the commission contend, what is their remedy? They would have no basis for seeking a judicial review of the I.C.C. order pursuant to 28 U.S.C. Section 1336, since their rights, presumably, would not stem from the order. Are they left with their remedy under the agreement, namely, arbitration? If so, they would be asking the parties who negotiated the agreement to arbitrate its adequacy and fairness. If the union refused to invoke arbitration, as it might well do, what remedy would the em-

ployee have?; and if the union agreed to arbitrate the question of the adequacy of its own agreement, and conscientiously pressed the employees' grievance, what standard would the arbitrators use in determining whether the protection agreed upon was adequate? If the arbitrators found the protection inadequate, would they have the power to set adequate protection which would be judicially enforceable in the event the carrier refused to comply with its findings; and what would be the position of the adversely affected employees while protracted arbitration was in process? Would they not be likely to be without compensation at the time they most needed it—hardly the result envisioned by congress when it enacted Section 5(2)(f). The foregoing are only a few of the questions left suspended in the air by appellant's position with respect to the effect of a Section 5(2)(f) third sentence agreement on the Commission's duty under that section.

By the way of contrast, the reading given Section 5(2)(f) by the lower courts recognizes the logical interplay of all three sentences of the section, and gives a meaning and scope to the words which at least recognizes the elementary purposes of the section and the underlying realities to which it applies. Thus, the courts below read Section 5(2)(f) as giving to railway labor and management a virtually free hand in agreeing upon protective conditions, subject only to review by the Commission in order to assure that agreed upon terms meet the minimum protective standards of the first and second sentences of that section. This reading recognizes the concrete realities likely to surround third sentence agreements both at the pre-merger and enforcement stages. At the pre-merger stage, the intrinsic nature of many Section 5 transactions will find at least some employees—often the weakest within the unions political structure—in the poorest position

to exert influence upon union leadership so as to assure themselves adequate protective conditions. The danger that interests of politically weak employees might be sacrificed, in return for more favorable terms for politically stronger employees, seems obvious. This danger is at least controlled, if not eliminated, by assuring that *third sentence agreements comply with the minimum protective standards of the first and second sentences of Section 5(2)(f)* under pain of Commission disapproval of any agreement which falls short of the statutory minimum.

Furthermore, unless the timely enforcement of at least the basic protective terms collectively arrived at is assured, the protective purposes of Section 5(2)(f) might well prove illusory to employees who most need protection at the post-merger stage. The case at hand illustrates the point. Here the railroad, after the merger, claimed that the trainmen were entitled to protection approximately, if coincidentally, equivalent to what they were entitled to by way of unemployment compensation. Their union either mistakenly agreed with the railroad or temporized so long that it might as well have agreed with the carrier—there was no practical difference to the trainmen in either case. Moreover, the acquisition of Sandusky Line not only split the trainmen's seniority district, it resulted in their lodge and the lodge at the other end of the Sandusky Line at Columbus being the only two lodges made up of N&W employees in a General Committee consisting of some 53 lodges, most of which are made up of Pennsy employees.* After three years of painstaking efforts to get some action on their claims, the trainmen were still uncompensated

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* It is interesting to note that throughout the course of this dispute—a period of nearly 3 years—the letterhead on the stationery from the Union's General Committee was never changed to reflect the fact that N&W employees were represented by that committee.

under the terms of the 1962 agreements. Their only practical avenue of redress was to the courts.

The courts below, implicitly at least, recognized these hard facts; their rulings, if affirmed, would assure that the question of whether the most vulnerable employees, in fact, receive at least the statutory minimum protection, will not be left to either the vagaries of chance or the passing experiences of internal union politics. Collective bargaining is thereby left free to function, limited only by a minimal standard aimed at preventing the bargaining process from becoming an instrument for defeating a cardinal objective of Section 5(2)(f)—fair and equitable protection for all affected employees. This minimal restraint on the processes of collective bargaining also impliedly recognizes that suppositions about the collective bargaining process, which may be valid in periods of normality, cannot be blindly accepted as likely to obtain in periods of internal political upheaval likely to attend Section 5 transactions. In this context, to stop short surrendering to the collective bargaining process absolute regulatory power over employee protection, by preserving a minimum of supervisory responsibility in the Commission at the pre-merger stage, and in the courts at the post-merger stage, is simply to accommodate the objectives of both the Interstate Commerce Act and Railway Labor Act in rational and fair way.

The alternative suggested by appellant would create two mutually exclusive protective and remedial schemes. The first, based upon the first and second sentences of Section 5(2)(f), would be operative only in cases where protective terms could not be agreed upon. Employees protected in this event would be assured at least the statutory minimum of protection by Commission order. If the

carrier refused to comply with that order, the employees would presumably have available to them the full range of remedies under the Interstate Commerce Act, including the right to damages under Section 9, costs and attorneys fees under Section 8, and even swift injunctive relief under Section 16 (12). The second scheme, as shown above, would be, at best, a labyrinth of uncertainty in which financially distressed employees might be faced with the equally grim alternatives of accepting what was given them, abandoning hope of fair protective conditions, or suing their own union for breach of its duty of fair representation. The absence of any reported case holding, or even suggesting, that congress intended to create such an unpredictable dual scheme of protection by enacting the third sentence of Section 5(2)(f) is some, if not conclusive, evidence of the unworkability and unfairness of such a dual and contradictory scheme.

The Commission has argued that since Section 5(2)(f) was revised to facilitate mergers at a time when nearly one-third of the nation's railroads were in receivership, carriers and unions could not have contended and congress could not have intended that the Commission would have to review the adequacy of third sentence agreements. To support its point, *the Commission hypothecates* a case where a financially troubled carrier agrees with the union "for employee protection of three instead of four years as provided in the second sentence of Section 5(2)(f)." The Commission concludes that under the lower courts decision it would, in this situation, have to review the adequacy of the agreement and require four years protection which might force the carrier to shut down to everyone's detriment (Commission brief, pp. 24-25).

Surely this argument proves too much. If the carriers and union can agree to three years protection, they can

agree to protection for two, or one, or no years as well; and if they can agree to less than four years protection when a carrier is in financial difficulty, they can agree to less than four years protection for some employees where a carrier is in a strong financial position and where the union leadership is willing to trade off the interests of a weak, dislocated minority in return for concessions to the unaffected majority in areas, for example, such as job security or working conditions. As shown above, unless the Commission reviews such agreements as to their fairness and adequacy, and unless such agreements are made part of the Commission's order, either by explicit adoption or by operation of law, there simply will be no practicable redress available in some cases for employees whose vital interests are sacrificed.

Moreover, the Commission's reading of the legislative history of Section 5(2)(f) is at variance with the interpretation given that history by this Court. The Supreme Court carefully reviewed this history in *Railway Executives Asso. v. United States*, 339 U.S. 142 at 148-154 as follows:

> "The legislative history of § 5(2)(f) shows that one of its principal purposes was to provide mandatory protection for the interests of employees affected by railroad consolidations. In 1938, the President appointed a Committee of Six to consider the transportation problem and recommend legislation. It was composed equally of representatives of railroad management and railroad labor. They endorsed the Washington Agreement and recommended amending § 5 of the Interstate Commerce Act so as to include the following:
>
> 'After the details of any proposed consolidation have been determined by the interests involved, they should be embodied in an application for approval, addressed to the Transportation Board. In passing

upon such an application, the Board should be governed by the following considerations:

* * * * *

'(*d*) The interests of the employees affected. The Board shall examine into the probable results of the proposed consolidation and require, as a prerequisite to its approval, a fair and equitable arrangement to protect the interests of the said employees.'

March 30, 1939, Senators Wheeler and Truman introduced S 2009, which, in § 49(3)(c), contained substantially the above language:

'The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected.'

"In the meantime, the House of Representatives considered a comparable bill, HR 4862, introduced by Representative Lea. Extended hearings were held. On the issue before us, this bill contained the same language as did the Senate bill. It required, as a prerequisite to the Commission's approval, 'a fair and equitable arrangement to protect the interests of the employees affected.' When S 2009 reached the House, the Committee in charge of it struck out everything after the enacting clause, substituted the text of the House bill and recommended its passage. In it, the provision in question took the form of an amendment to § 5 of the Interstate Commerce Act.

"If this provision, which later became the first sentence of § 5(2)(f) now stood alone as it did then, the Commission unquestionably would have power to grant at least as much relief to employees as it had under § 5(4)(b). The crucial question is whether the second sentence of § 5(2)(f), which was inserted soon thereafter, amounts not only to an additional provision for the protection of labor, but also to a limitation upon the discretion vested in the Commission by the first sentence.

"The second sentence of § 5(2)(f) has a significant history of its own. On the floor of the House, Representative Harrington suggested the following proviso to follow the first sentence:

'*Provided, however,* That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.'

"The Harrington Amendment thus introduced a new problem. Until it appeared, there had been substantial agreement on the need for consolidations, together with a recognition that employees could and should be fairly and equitably protected. This amendment, however, threatened to prevent all consolidations to which it related.

"With the Harrington Amendment in it the bill went to conference. It came out with all provisions relating to consolidations under § 5 eliminated. The House, however, recommitted the bill to conference with instructions to insert a modified form of the first sentence of § 5(2)(f), together with a modified form of the Harrington Amendment. The modification of the first sentence merely extended the original language as to fair and equitable arrangements so as to include abandonments as well as consolidations. The modification of the Harrington Amendment is not now material.

"The second conference reported § 5(2)(f) in the final form in which it was enacted into law. It retained the first sentence in its original language. In the second sentence, however, it included a substantial change in the Harrington proposal. It limited it to the four years following the effective date of the Commission's order of approval. It provided also that in each case the protective period was not to exceed the length of each employee's employment by a carrier prior to the effective date of the Commission's order

of approval. This clause emphasized the separability of the second sentence, for it provided that "the protection afforded to any employee pursuant *to this sentence* shall not be *required* to continue for a longer period, . . ." than that prescribed. (Emphasis supplied. See p. 145, supra, for full text of the clause.)

"The second sentence thus gave a limited scope to the Harrington Amendment and made it workable by putting a time limit upon its otherwise prohibitory effect. There was no comparable need for such a restriction upon the first sentence. We find, therefore, that the time limit in the second sentence now applies to it and to it alone. As thus limited, that sentence adds a new guaranty of protection for the interests of employees, without restricting the Commission's power to require greater protection as part of a fair and equitable arrangement. This serves the purpose of the sentence to increase, rather than to decrease, the protective effect of the paragraph. . . .

"We conclude, therefore, that the Commission, while required to observe the provisions of the second sentence of § 5(2)(f) as a minimum protection for employees adversely affected, is not confined to the four-year protective period as a statutory maximum. The Commission has the power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years from the effective date of the order approving the consolidation."

Despite this Court's unqualified conclusion that one of the principal purposes of Section 5(2)(f) "was to provide *mandatory protection for the interests of employees affected by railroad consolidations*," and that the Commission is "*required to observe the provisions of the second sentence of Section 5(2)(f) as a minimum protection for employees adversely affected* * * *," this Court is now asked to hold that the third sentence of Section 5(2)(f) renders the requirements of the first and second sentences utterly inapplicable; that the third sentence

relieves the Commission of any responsibility to assure the existence of any protection at all much less a mandatory minimum. Trainmen submit that this argument ignores this Court's reading of Section 5(2)(f) in *Railway Labor Executives Asso. v. United States.*

B. Legislative history and past administrative practice.

Furthermore, the suggestion that railway labor, by seeking the inclusion of the third sentence of 5(2)(f), intended to negate the operation of the first and second sentences in cases where protection is agreed upon, is at odds with the sense of the pertinent legislative history. As the Commission has noted, at the time Section 5(2)(f) was enacted in 1940 the Washington Job Protection Agreement, which called for five years of compensation protection, had approximately one year to run, and was thereafter to continue in effect except that a union or carrier could withdraw one year after notice. If railway labor intended in this context that the third sentence was to mean what N&W and the Commission suggest, it would mean that it was in the peculiar position of deliberately seeking to weaken its own bargaining position in cases where agreement on protective conditions was sought. For instance, if the first and second sentences of Section 5(2)(f) are to have no application in cases where protective conditions are collectively agreed upon, the railroad and union would in these cases start from a position which presupposed no obligation to meet any mandatory minimum level of protection; and a carrier signatory to the Washington Agreement would simply have to give notice of its withdrawal from that agreement in order to put itself in a position where it would be bargaining for merger conditions under a standard no more definite than that contained in the third sentence, with the realization that if

no agreement could be reached the Commission would probably impose conditions consistent with the statutory minimum.

A more logical reading of this legislative history is that railway labor, realizing that the effective period of the Washington Agreement was about to expire, saw and welcomed the first and second sentences of Section 5(2)(f) as creating a mandatory minimum floor of protection, roughly equivalent to that contained in the Washington Job Protection Agreement, which would permit the unions to bargain upward for more favorable protective conditions where it was possible to obtain them. Read in this light, the first and second sentences, rather than hamstringing industry attempts at democratically working out the problem of employee merger protection, actually promote agreements. It will surely be easier to reach agreement on employee conditions if both parties have before them a clear minimum standard which their bargaining efforts must meet, rather than bargaining with only the vague proviso contained in the "notwithstanding" clause before them. If Congress, which is obviously concerned with workable standards promotive of statutory objectives, expended so much effort in working out the contours of Section 5(2)(f), whose primary objective is employee protection, only to renounce any regulatory duty in cases where conditions were agreed upon, it seems slightly incredible that it would choose so tortuous and confusing a means of doing so.

Significantly, the position now taken by the Commission is contrary to past judicial and administrative definition of the power and duties conferred by Section 5(2)(f) on the Interstate Commerce Commission. *Railway Labor Executives Assoc. v. United States, supra,* established a floor of protection, allowing the Commission to impose a

"fair and equitable arrangement" for employee protection in excess of four years.

The meaning of the term "worse position with respect to their employment," in Section 5(2)(f) has been adjudicated. In 1960 the I.C.C. following many years of precedent, rejected the employees' contention that the section required a "job freeze," employment for a period of four years, rather than the monetary compensation in the past. *Erie-Lackawanna Merger*, 312 I.C.C. 185.

The I.C.C.'s position that the retention of unnecessary positions was unwarranted and the monetary compensation was sufficient to satisfy the requirements of the second sentence of Section 5(2)(f) was sustained in the Supreme Court. *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169 (1960).

The Court's decision was grounded on two principal bases. First, the legislative history of the Transportation Act of 1940 revealed that a "job freeze" was not contemplated by Congress in the enactment of Section 5(2)(f) and secondly, such an interpretation of the legislative history was reinforced and confirmed by subsequent events.

The Court noted that since the statute was passed, the Commission had consistently *followed the practice of imposing compensatory protection in over 80 cases, with full support of the intervening unions and the Railway Labor Executives' Association.*

The Supreme Court summarized its position by saying:

> "In short, we are unwilling to overturn a long-standing administrative interpretation of a statute, acquiesced in by all interested parties for 20 years, when all the signposts of Congressional intent, to the extent they are ascertainable indicate that the ad-

ministrative interpretation is correct." *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. at 179.

This Court's reference to the Commission's imposition "of compensatory protection in over 80 cases" is significant here because in many of those cases the union and carrier *had reached agreement on protective terms and the Commission incorporated these agreed upon conditions in its approval order.* This fact is unequivocally acknowledged by the Commission in its brief as amicus curiae filed in *Clemens v. Central R.R. Co. of New Jersey*, 264 F. Supp. 551, reversed, 339 F.2d 825, certiorari denied 393 U.S. 1023 wherein the Commission stated:

> "It may be expected that it is more typical, where the unions and the railroads are able to agree upon the protection to be accorded employees, that agreement is generally reached during the course of the proceedings before the Commission. *Where employee unions and railroads have stipulated to a particular set of labor conditions, the Commission has consistently imposed such conditions for the protection of the union members.* E.g., *Gulf, M. & O. R. Co. Purchase, Securities*, 261 I.C.C. 405, 434 (1945); *Erie R. Co. Trackage Rights*, 295 I.C.C. 303 (1956); *Delaware, L.&W. R. Co. Trackage Rights*, 295 I.C.C. 743 (1958). In some cases, the Commission *has adopted such stipulated conditions for employees whose union signed such agreements even when it was of the view that different protection should be adopted for employees not represented in the stipulation.* See, e.g., *Wheeling & L. E. Ry. Co. Control*, 267 I.C.C. 163, 184 (1946); *Pere Marquette Ry. Co. Merger*, 267 I.C.C. 207, 235 (1947); *Detroit, T. & I. R. Co., Control*, 275 I.C.C. 455, 487 (1950); *Valdosta S.R. Purchase*, 282 I.C.C. 705, 711-12 (1952)" (A. 173.)

That the Commission has consistently reviewed pre-merger agreements respecting employee protection, was

dramatically borne out in *Florida East Coast Ry. Reorganization,* 307 I.C.C. 5 (1958). In this case the Interstate Commerce Commission rejected, as contrary to the public interest, an agreement *stipulated to by all parties which* "in effect, would guarantee all employees against loss of pay or seniority rights during their lifetime * * *." The district court for the Southern District of Florida, sitting as the reorganization court, accepted and approved the Interstate Commerce Commission ruling finding, "not an abuse of discretion, but the exercise of an enlightened discretion." *In the matter of Florida East Coast Ry.,* 171 F. Supp. 512, 519 (S.D. Fla. 1959). The Commission may have had cases like *Florida East Coast* in mind in stating that "although the 1962 agreement relieved the Commission of any duty to act under Section 5(2)(f), the Commission retained, and still retains under Section 5(9) of the Act . . . the power to supplement the protection afforded under Section 5(2)(f)." Section 5(9) provides: "The Commission from time to time, for good cause shown, may make such orders, *supplemental to any order made under paragraph (1), (2) or (7),* of this section, as it may deem necessary or appropriate." But the Commission has contended that it neither reviewed the pre-merger agreements in the instant case, nor *adopted these conditions as part of its order.* If the conditions were not made part of its order, it is difficult to understand how Section 5(9) could be the basis for supplementing employee protection *by supplementing the Commission's order;* and if the employee conditions in the present case were made part of the Commission's order, then the courts below had jurisdiction to enforce that order.

A more reasonable interpretation of the purpose of Section 5(9), as respects the Commission's duty under Section 5(2)(f), is that since, as the Commission notes,

"Section 5(2)(f) does not limit the Commission's authority to grant greater protection" than provided by that section, the Commission is to retain the discretionary authority to protect rail labor beyond the mandatory minimum required by Section 5(2)(f) if it finds the statutory minimum inadequate, whether or not conditions are agreed upon. This interpretation recognizes that the first and second sentences of Section 5(2)(f) expresses the congressional conclusion that *it is in the public interest to require the Commission to assure a mandatory minimum of employee protection in its orders approving Section 5 transactions;* that promised employee protection might be rendered practically meaningless in cases where a Section 5 transaction weakens financially distressed employees' position within the union, unless the affected employee can obtain reasonably prompt judicial enforcement of those protective conditions by enforcing the Commission's order. It is submitted that there is nothing inconsistent in granting the Commission the power to require a minimum level of protection, even in cases where the source of protection is a collective agreement, and permitting the Commission in the "public interest" and where good cause is shown, to either supplement these agreed upon conditions where it finds them inadequate, or to reduce them where it finds them excessive as in the *Florida East Coast* case.

C. Past understanding of railway labor and management regarding the scope of Commission's duties under Section 5(2)(f).

Not only is the Commission's position here inconsistent with its past practice under Section 5(2)(f), it is contrary to the clear understanding of that section's meaning long accepted by both railway labor and management.

The clearest possible expression of railway labor's understanding of the Interstate Commerce Commission's duty under Section 5(2)(f) is found in the Manual of Information and Instruction, Brotherhood of Railroad Trainmen, 10M—3rd Rev.—1962 at 139, 150 as follows:

> "Common carrier applications for acquisition of control over one or more other common carriers by railroad; and for consolidation, merger, or unification of two or more common carrier railroads; and for approval of trackage right agreements between two or more railroads, are filed with the Interstate Commerce Commission in accordance with the provisions of Section 5(2) of the Interstate Commerce Act. Such applications are also listed as Finance Dockets and must receive the approval of the I.C.C. before the carrier proposal can be placed into effect. The Congress of the United States recognized that employees of the carriers involved in such a transaction may be adversely affected and *made it mandatory upon the I.C.C., through enactment of the Harrington Amendment,* Section 5(2)(f), Transportation Act of 1940, *to prescribe terms and conditions for the benefit of employees adversely affected.* . . .
>
> "As previously stated in the article dealing with Acquisitions, Consolidations, Mergers, Etc., the Harrington Amendment is a *mandate upon the Interstate Commerce Commission to impose adequate terms and conditions for the benefit of employees adversely* affected in transactions coming within the purview of Section 5(2) of the Interstate Commerce Act, *and to accept and incorporate in its order of approval an agreement pertaining to the protection of the interest of employees entered into by and between the representatives of the carriers and the duly authorized representatives of the employees.*"

Trainmen submit that this clear understanding of their union that Section 5(2)(f) mandates a minimum level of

protection and requires the Commission to "accept and incorporate in its order of approval an agreement pertaining to the protection of the interest of employees" between railroad and union, is not only consistent with longstanding Commission practice as expressed in its brief amicus curiae in *Clemens* (p. 56 *supra*) but, more importantly, conforms with this Court's interpretation of Section 5(2)(f) in *Railway Labor Executives Assoc. v. United States supra.*

Finally, railroad management, where it has proved self-serving, has not hesitated to urge upon the courts the conclusion that the commission's duty is to include third sentence 5(2)(f) agreements in its order, so that a union refusal to comply with that agreement can be enjoined as a violation of the Commission's order rather than be dealt with as a dispute under the Railway Labor Act. This fact is most clearly demonstrated in the case of *Brotherhood of Local Engineers v. Chicago and Northwestern Ry. Co.*, 314 F.2d 424 (8th Cir.), Cert. denied, 375 U.S. 819 (1968).

Northwestern involved an action by the railroad against the unions for declaratory relief to enjoin the unions from invoking the "major dispute" procedures of the Railway Labor Act* in adjusting seniority rights of

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* These procedures are described by Justice Harlen in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Company*, 394 U.S. 369 at 378 as follows:

"The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. Paragraph 6. The parties must confer, paragraph 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services sua sponte if it finds a labor emergency to exist. Paragraph 5 First. If mediation fails, the Board

(Continued on following page)

employees affected by consolidation of plaintiff's railroad yard with the newly acquired railroad yard. The railroad claimed that the matter should be settled under the arbitration clause in the Section 5(2)(f) conditions imposed by the commission. In *Northwestern,* as in the instant case, Section 5(2)(f) conditions were reached by agreement between the parties with the same stipulation entered into by the parties here, namely, that "the Commission may accept this agreement as one providing a fair and equitable arrangement for the protection of the interests of such employees as provided in Section 5(2)(f) of the Interstate Commerce Act." The union claimed that because the proposed coordination would work a change in pre-existing collective agreements, the "major dispute" provisions of the Railway Labor Act governed the proposed coordination.

In upholding the decision of the District Court requiring the union to arbitrate, the Appeals Court held that the prior agreement of the parties was adopted by the Commission in compliance with Section 5(2)(f), which requires the Commission to assure employee protection, and therefore the suit was to enforce a Commission order. In assuming jurisdiction and rejecting the union's argument that the Railway Labor Act governed the dispute, the court held that 49 U.S.C. Section 5(11) ex-

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(*Continued from preceding page*)

must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. Paragraphs 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. Paragraph 10. While the dispute is working its way through these stages, neither party may unilaterally alter the status quo. Paragraphs 2 Seventh, 5 First, 6, 10."

empted the railroad from the operation of the Railway Labor Act. In considering the question of how it should determine whether the case should be deemed to arise under the Interstate Commerce Act or the Railway Labor Act, the Court cited the test set forth in *Gulley v. First National Bank*, 299 U.S. 109, 112: "The right or immunity must be that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." The court concluded that "like the Harrington Amendment,* the Railway Labor Act, if it applied, would threaten to prevent many consolidations."

The trainmen submit that what the *Northwestern* Court said with respect to effect of applying the Railway Labor Act to the railroad's coordination efforts in that case, applies with equal validity to effect which might be created if employees in the position of the Sandusky trainmen cannot seek judicial enforcement of the protective conditions in pre-merger agreements. In *Northwestern*, of course, had the union's view prevailed, the railroad would have been faced with the costly and difficult prospect of exhausting the designedly protracted procedures for changing the pre-existing collective agreements in order to carry out the Commission approved coordination. Even after exhausting these lengthy procedures, there would be no guarantee that an agreement

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* The court was obviously referring here to the fact that the Harrington Amendment as initially introduced would have required that the Commission withhold approval if a transaction would displace workers, or impair their employment rights. 84 Cong. Rec. 9882 (1939). The Congress, of course, adopted a revised version of the Harrington Amendment by enacting the second sentence of Section 5(2)(f) which requires a minimum of four years protection during which [the] transaction will not result in employees of said carrier * * * being in a worse position with regard to their employment." 86 Cong. Rec. 5886.

between the parties could be reached, so that the railroad might well have faced the unhappy prospect of being met with a strike if—after major dispute procedures were exhausted—it decided to resort to self-help remedies by accomplishing the Commission approved coordination over union objection. This would place the coordination itself at the mercy of the outcome of economic warfare, as both parties utilized self-help remedies to coerce an acceptable agreement. In short, the Commission's approval of the coordination might have been thwarted at considerable cost to the railroad and probably at the expense of the public interest. The *Northwestern* court simply perceived this problem and decided the case on the belief that the overriding objectives of the Interstate Commerce Act required that it assume jurisdiction and grant swift declaratory relief to the railroad.

If what is sauce for the goose is sauce for the gander, then employees who are denied merger benefits, like carriers denied effectuation of an approved merger by obstructionist union tactics, should be accorded access to judicial enforcement of their rights in cases like the present one, unless assuring employee protection is to be discarded as a primary objective of 49 U.S.C. Section 5(2)(f). Moreover, it may prove to be manifestly in the public interest to assure the same avenue of redress to employees as was granted the carrier in *Northwestern*. A simple illustration will explain the point.

Assume for purposes of discussion that the Sandusky trainmen had been a numerically large and politically strong group of employees; and, that when N&W, several months after the merger, announced its intention to calculate their benefits on Sandusky earnings only, divided by 12, they had taken the position that this action would clearly change the very terms of their pre-merger agree-

ment in violation of the "major dispute" procedures of the Railway Labor Act; that in response to N&W's insistence upon using Sandusky earnings only the union had struck.

In this assumed situation, it seems safe to conjecture that the carrier would move immediately to dissolve the strike by injunction. In this situation the court would be required to accommodate the objectives of both the Railway Labor Act and the Interstate Commerce Act. In this context it could not fairly order the parties to arbitrate since the arbitration clause covers only minor disputes—those over mere matters of "interpretation or application" of the agreement—and here the dispute, if the Railway Labor Act were deemed applicable, would be "major." If it ordered restoration of the "status quo" under the Railway Labor Act, it would be in the anomalous position of ordering the railroad to continue paying merger benefits only until such time as it had exhausted protracted mediation procedures, during which period the railroad could seek an agreement which would reduce employee merger benefits, and at the conclusion of which both parties could resort to self-help remedies if an agreement were not reached. In this incongruous situation it is doubtful that the public interest in avoiding unnecessary strikes would be much better served than would the interests of adversely affected employees in receiving promised merger protection. Obviously, such an anomalous situation could not arise if the Railway Labor Act were simply deemed inapplicable and the employees were permitted to enforce their rights under the Interstate Commerce Act. The latter alternative simply recognizes that while the Railway Labor Act procedures may serve as an effective framework for regularizing and resolving industry disputes in the context of an ongoing, stabilized labor-

management relationship, it ill-serves the objectives of either the Railway Labor Act or Interstate Commerce Act in cases like *Northwestern* or *the one at hand*. The District Court recognized this fact and concluded:

> "While it is generally true that no two cases are exactly alike, and the *Northwestern* case when compared to the instant controversy is not an exception to that general rule, they are enough alike in all material respects that the case is authority for the plaintiff's position here on the question of jurisdiction." (A. 27).

Finally, we ask this Court to consider what N&W's response would have been had the unions in the instant case taken the position following N&W's takeover at Sandusky, that every change in rules or working conditions not specifically covered in the pre-merger agreement, would require N&W, in order to effect the change, to follow the "major" dispute procedures of the Railway Labor Act; that every attempted change was met with a strike threat. Is there any doubt that N&W would have moved swiftly, as did the carrier in *Northwestern,* for an injunction ordering the union to comply with the Commission's order by arbitrating any such dispute. Certainly N&W would have relied on *Northwestern* to show that 49 U.S.C. Section 5(11) relieved it of all restraints of the Railway Labor Act; that the *arbitration clause which is included in the pre-merger agreement was made part of the Commission's order;* and that the union's refusal to arbitrate the dispute was enjoinable as a violation of the Commission's order.

The point here is that the pre-merger agreements contained much more than an agreement on employee protective conditions. Since it would be totally illogical to argue that the Commission incorporated in its order all the provisions of the pre-merger agreement except

those dealing with employee protection, it follows that the Commission either adopted the entire agreement in its order or failed to adopt any part of it. If the Commission adopted no part of the pre-merger agreement, it would mean that, in practical effect, it left effectuation of this entire transaction subject to the union's option to invoke or waive its right to require strict compliance with Railway Labor Act in putting this transaction into effect. Had the union done in this case what the union did in *Northwestern,* however, trainmen doubt that the Commission would be here arguing that it did not adopt the pre-merger agreement in its order and, therefore, the parties *were not relieved of the restraints of the Railway Labor Act as* provided in 49 U.S.C. Section 5(11). By narrowing the gauge of their discussion to include only the question of employee protection, both N&W and the Commission have lost sight of the broader aspects of Section 5 transactions. All the trainmen are asking is that the interests of affected employees in receiving effective protection against the adverse effects of rail consolidations be given the same recognition and enforcement as a railroad's interest in seeing that a transaction is carried into effect.

In summary, Section 5(2)(f) on its face implies the necessity for Commission review at the pre-merger stage of third sentence agreements respecting employee protection, unless the "notwithstanding" clause is read as conferring upon railroads and unions unreviewable discretion to decide, ipse dixit, what constitutes adequate and fair protection. Moreover, this interpretation of Section 5(2)(f) would inevitably lead, at the post-merger stage, to cases where promised protection might prove cruelly illusory to employees most in need of protection, since dislocated employees would be left with no practical avenue of redress in cases where, for one reason or an-

other, their union refused or neglected to press their claim for enforcement of merger conditions. The Supreme Court's decisions in *Railway Labor Executives Association v. United States*, 339 U.S. 142, and *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169, strongly suggest that this Court has interpreted Section 5(2)(f) as imposing upon the Commission a mandatory duty to assure that merger affected employees are effectively assured at least the minimum level of protection expressed in the second sentence of Section 5(2)(f). And finally, the past practice of the Commission itself; and the understanding of Section 5(2)(f) of both the unions and railroads, reflect a longstanding awareness that both the objectives of the Interstate Commerce Act and Railway Labor Act will best be served by the interpretation of Section 5(2)(f) urged by respondent. For these reasons, the interpretation of 49 U.S.C. Section 5(2)(f) belatedly urged by the appellant and the Commission should be rejected.

II. ASSUMING ARGUENDO THAT THIS COURT DECIDES THAT THE PRE-MERGER AGREEMENTS WERE NOT INCORPORATED EITHER EXPRESSLY OR BY OPERATION OF LAW INTO THE COMMISSION'S ORDER, THE COURTS BELOW WOULD HAVE BEEN REQUIRED, NEVERTHELESS, TO ASSUME JURISDICTION OVER THIS CONTROVERSY.

The courts below based their jurisdictional ruling on the assumption that the protective terms of the pre-merger agreement were incorporated in the Commission's order. The courts, however, also had before them a post-merger agreement—so called Implementing Agreement 1-A and a letter of understanding contemporaneously executed on October 25, 1965—which N&W claimed was a binding and enforceable collective agreement limiting the plaintiffs to

their remedies under the contract. The courts, of course, rejected this contention on the grounds that the post-merger agreement on its face substantially abrogated the basic employee protection called for in the pre-merger agreement, and therefore failed to meet the requirements of Section 5(2)(f) of the Interstate Commerce Act.

Had the District Court, however, been confronted with and accepted the Commission's contention that the pre-merger agreement was never incorporated in its order, the court would have been required to determine whether the post-merger conduct of the railroad and union, and the agreements themselves, gave rise to a basis for federal court jurisdiction. Trainmen contend that they did.

The third sentence of Section 5(2)(f) is certainly intended to cover agreements respecting employee interests in the wake of railroad consolidations, both at the pre-merger and post-merger stages. At the post-merger stage, however, it is hardly likely that Congress was simply telling rail labor and management that they could continue to bargain collectively. Since the Railway Labor Act is continuously operative in the context of rail consolidations except to the extent that 49 U.S.C. Section 5(11) makes the Interstate Commerce Act "exclusive and plenary," Congress must necessarily have intended the third sentence of 5(2)(f) to require that post-merger agreements dealing with matters of employee protection meet the standard set forth in the third sentence. If so, this case raises the question whether, assuming the Commission has not included collectively agreed upon protective terms in its order, an agreement entered into over a year after that order which negates those protective terms gave rise to an action under 49 U.S.C. Sections 8, 9 and 16(12). It is submitted that unless employees in this assumed situation can bring their claim for relief to the courts, the protective scheme of the

Interstate Commerce Act will inevitably become a meaningless and illusory promise to some merger victims most in need of protection. The instant case demonstrates the point.

The record shows that while the trainmen were in "dire need of money" during the first post-merger year, the railroad stalled in making benefit payments alleging delay in getting the needed earnings records from the Pennsy. Under extreme pressure from the trainmen affected, union and management on October 25, 1965—a year and ten days after the merger—entered into agreements which N&W eventually claimed limited total benefits due to slightly more than what had already been paid by way of unemployment benefits. Thus it was not until more than a year after the merger that N&W had even an arguable basis for denying the trainmen the compensation protection promised in the pre-merger agreement. By temporizing in the matter of protection N&W, thereby, foreclosed the trainmen from seeking at least one remedy which they could have chosen had they had any reason to suspect that a post-merger agreement destroying their basic merger protection would be entered into. Cases to review an Interstate Commerce Commission order pursuant to 28 U.S.C. Section 1336 must be brought by or against the United States, 28 U.S.C. Section 2322, and must be filed within 90 days after the date the Commission's order becomes final, 28 U.S.C. Section 1336. Thus, even if it is assumed that the Commission need not incorporate collectively agreed upon conditions in its order, there would be no reason why it *could not do so before or after the merger, in a case where the practical exigencies of a given case required it to do so in order to effectuate the objectives of the Act.* For instance, if it became clear in the immediate post-merger stages that adversely affect-

ed employees would be placed in the intolerable position which the trainmen found themselves following the instant merger unless they were permitted swift access to the remedial scheme embodied in 49 U.S.C. Sections 8, 9, and 16(12), it would seem that an appropriate avenue of relief would be to sue for an order to review the Commission's order for the purpose of showing that protection might be practically denied unless the Commission were ordered to include the agreed upon protection in its order.

In the instant case, the trainmen were not only confronted with three years of temporizing, they were first notified that the Commission did not deem itself to have ordered any employee protection when they were in the United States Supreme Court. If victimized employees would have the right under the statutes noted to seek an order requiring the Commission to order employee protection in an appropriate case, are employees to be denied effective means of assuring enforcement of merger conditions in a case where through no fault of their own they are led to believe for more than 90 days after the Commission's order that they are to be fairly and adequately protected. Trainmen contend that the third sentence of Section 5(2)(f) does not permit rail management and labor to do at the post-merger stage what they could not do at the pre-merger stage, namely, to repudiate the need for "a fair and equitable arrangement to protect the interests of the railroad employees affected" by a Section 5 consolidation. Even assuming that the Commission *did not incorporate the pre-merger terms in its order*, it is clear from the order itself that it satisfied itself that the agreement met the minimum requirements of Section 5(2)(f). Unless politically dislocated merger victims are afforded the minimum protection of Section 5(2)(f), their rights can easily become a mere "bargaining chip" in the post-

merger dealings of the railroad and union. Furthermore, unless the minimum level of protection required by the first and second sentences is assured them, it will prove all too easy to eliminate compensatory protection in exchange for an allegedly "greater good" determined by those whose interests may be basically opposed to those of the employee victims. The record at hand illustrates the problem.

N&W has gone to great lengths to show that the post-merger agreement did not "abridge any rights previously vested" in the trainmen and, in fact, gave them valuable additional benefits not provided for in the pre-merger agreement. As will be shown below, however, the post-merger agreements took away all meaningful protection provided for in the pre-merger agreement and, in return, "certified" that the employees whose protection had been destroyed were "adversely affected." It seems safe to conjecture that the trainmen who had been living on unemployment compensation for a year knew that they were "adversely affected" at the time the post-merger agreements were made.

It is significant that despite the patent absurdity of N&W's position that the post-merger agreement, as construed by the railroad, really was in the employees interest, their union did nothing to effectively advance their claim for relief. As the months stretched into years the compensation protection promised in the pre-merger agreement became a more and more hollow promise. Simply put, what had occurred was that the pre-merger agreements which the Commission found to be "in conformity with Section 5(2)(f) of the Act for the protection of the covered employees," (A. 197) were virtually ignored by the parties as far as this most seriously affected band of Sandusky trainmen were concerned. Having done, as the

court below found, everything possible to exhaust their internal remedies, these men were forced into a position of choosing between abandonment of their claim or suing.

The point here is that had the trainmen chosen to sue on the basis that the post-merger agreement patently did not "pertain to the protection of (their) interests," as required by the third sentence of Section 5(2)(f), they clearly had the right to do so under 49 U.S.C. Sections 8 and 9.

Section 8 provides:

> "In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with reasonable costs and attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. Feb. 4, 1887, c. 104, Pt. I, Sec. 8, 24 Stat. 382; Aug. 9, 1935, c. 498, Section 1, 49 Stat. 543."

Section 9 provides in pertinent part:

> "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaints to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case

elect which one of the two methods of procedure herein provided for he or they will adopt. . . ."

Had the trainmen chosen to sue on the basis of the post-merger agreements alone, the issue presented would have been as follows: did the "common carrier . . . do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful. . . ." If post-merger agreements must "pertain to the protection of the interests" of affected employees, it seems too obvious to remark that a post-merger agreement which does not protect basic employee interests but, rather, abrogates protection promised in Section 5(2)(f), is an act "declared to be unlawful in this chapter," and is actionable under Sections 8 and 9.

Because incorporation of the pre-merger agreement was admitted, the District Court simply dealt with the question of whether, assuming jurisdiction existed because of incorporation, a post-merger agreement which "abrogates" employee protection is enforceable as a matter of law. Hence the court was never asked to decide whether, in addition to the question of its enforceability, such an agreement entered into by a carrier would give rise to an action for damages, costs and attorneys fees under 49 U.S.C. Sections 8 & 9.

Petitioner may argue that the question of whether a post-merger agreement "pertains to the protection of the interests" of affected employees is a question which should be left to the processes of the Railway Labor Act. Such an argument, however, fails to touch down on hard reality for several reasons: The only conceivable avenue for an employee to use in challenging a third sentence agreement affecting basic monetary protection promised under Section 5(2)(f) would be the "minor" dispute procedures of the Railway Labor Act; in other words, the

channel for pressing grievances stemming from questions of contract interpretation or application. In a case like the present one, however, the problem is not one of mere contract interpretation, but rather of a basic change in the very protective terms of the pre-merger agreement itself. In effect, N&W is claiming that it has a post-merger agreement which drastically alters the "formula" to be used in calculating merger benefits as provided for in the pre-merger agreement. Petitioners argument that this position is based on any language in the pre-merger agreement simply does violence to the plain meaning of the words in the pre-merger agreement.

Secondly, even if this dispute, despite the fact that agreement 1-A on its face drastically reduces compensation protection, were deemed merely one concerning "interpretation" of that agreement, Railway Labor Act procedures, if blindly applied, could become an instrument for destroying basic employee protection agreed upon as a condition for consolidation. It would be tantamount to conferring upon railway labor and management a carte blanche invitation to ignore the proviso, included in the third sentence of Section 5(2)(f), that agreements dealing with merger related employee interests must pertain to the protection of those interests, to leave to the sole discretion of the unions both the question of whether or not an agreement, in fact, complied with that proviso, and whether or not, in the event an employee challenged the adequacy and fairness of such an agreement, a grievants claim would even be processed.

Finally, Congress clearly expressed its will that the Interstate Commerce Act would be "exclusive and plenary" so far as necessary to carry into effect the objects of that Act. Leaving open the doors of the courts to employees who find themselves in the position of having basic

merger protection taken away by agreement at the post-merger stage is simply to recognize the inherent realities of the railroad industry and to give full play to the protective scheme embodied in the Interstate Commerce Act.

In summary, trainmen submit that had incorporation been successfully disputed at the trial level, the District Court would have been required to assume jurisdiction over this dispute on the basis that the post-merger agreements clearly violated the provision of Section 5(2)(f) and gave rise to an action under Sections 8 and 9. Any other result would be tantamount to holding that in the post-merger stages a carrier is free to seek a collective agreement which destroys out of hand the protection solemnly promised before the Commission as a condition of its approval of the consolidation sought.

III. IMPLEMENTING AGREEMENT 1-A, IN FACT, SUBSTANTIALLY ABROGATED EMPLOYEE PROTECTION GUARANTEED BY THE PRE-MERGER AGREEMENTS AND VIOLATED THE PROVISIONS OF SECTION 5 (2) (f) OF THE INTERSTATE COMMERCE ACT.

Petitioner's contention regarding post-merger agreement 1-A is that this agreement "did not abridge any rights previously vested in respondents by the 1962 agreement * * *," (petitioner's brief, p. 51); "that 1-A is fully consistent with the policy and provisions of Section 5(2)(f) of the Interstate Commerce Act" (petitioner's brief, p. 40); and, therefore, is a binding and enforceable agreement which "disposes of respondents' claims in this proceedings" (petitioner's brief p. 51). In support of this argument N&W contends that the courts below "ignored the major additional benefits with respect to matters other than compensation . . . under the agreement . . ." (petitioner's brief, p. 41); that the Trainmen's National Union

found agreement 1-A ". . . was in conformity with the 1962 agreement and was necessary to implement and effectuate the general protection standards of that agreement . . ." (petitioner's brief, p. 51); and that the courts below erred in "the conclusion . . . that an agreement subsequent to Commission approval of a merger is invalid unless it is totally consistent with any previous order entered by the Commission for protection of the covered employees . . . (under) . . . Section 5(2)(f)" (petitioner's brief, p. 51).

The holding of the courts below with respect to 1-A is summarized by the Court of Appeals as follows:

> "* * * Here the subsequent agreement abridged rights previously vested in the appellees by virtue of the I.C.C. order. The agreement in *Arnold* did not take away rights already granted, but merely added a new term to the I.C.C. order. The agreement now before us, in contrast, goes to the very heart of the protections to be afforded the appellees under the order. Furthermore, we find implementing Agreement 1-A to be contrary to the policy of the Act, as embodied in the second sentence of Section 5(2)(f), which expressly makes provision to protect employees affected by a merger. The appellees here would appear to be precisely those employees protected by the provisions of the Act. The merger split their seniority district and, as a result, they were unable to receive the working time previously obtainable before the merger—no matter which option they chose. As the 1967 (sic.) agreement abrogated certain rights and protection previously guaranteed to the appellees, we are in agreement with the District Court that the agreement is unenforceable. An agreement made pursuant to the last sentence of Section 5(2)(f) may vary the protections afforded by the I.C.C. order, but it may not substantially abrogate employees' rights grounded in an I.C.C. order. Nor may it frustrate

the policy of the Act, as Implementing Agreement 1-A clearly did in the present case."

Obviously the courts below disagreed with petitioner's contention that 1-A did not "abridge" employee protection and that it was ". . . fully consistent with the policy and provisions of Section 5(2)(f)." Thus, the issue here can be sharply stated as follows: (1) did 1-A, in fact, substantially abrogate employee protection; and (2) if it did, was it contrary to policies and provisions of Section 5(2)(f)?

In considering these questions, it seems important to point out that petitioner's argument has placed it on the horns of a dilemma. By arguing that 1-A doesn't, in fact, substantially abrogate protective benefits, petitioner impliedly recognizes that if it *does,* logic and reason require the conclusion that Section 5(2)(f) has been violated. In other words, it would simply make no sense to argue that a post-merger agreement which "substantially abrogates" basic merger protection due adversely affected employees could conceivably be one "pertaining to the protection of the interests" of those employees as required by Section 5(2)(f). In the previous section, respondents attempted to show that an agreement which violates the provisions of the third sentence of Section 5(2)(f) should be deemed actionable under 49 U.S.C. Sections 8 and 9, if the protective objectives of the Interstate Commerce Act are to be realized. In this section trainmen will simply call the court's attention to the basis for the lower courts' finding that the post-merger agreements, in fact, substantially abridged "the very heart of the protections" promised in the pre-merger agreement.

In considering the pertinent evidence, trainmen urge the court to keep in mind that *the lower courts did not hold,* as N&W has contended, *that a post-merger agreement must be "totally consistent with any previous order*

* * *" (petitioner's brief p. 51), or that "Section 5(2)(f) does not permit the parties to reach agreements subsequent to Commission approval which deviate from the conditions which the parties had originally agreed upon * * *" (petitioner's brief, p. 40). On the contrary, the courts held that "an agreement made pursuant to the last sentence of Section 5(2)(f) *may vary the protections* * * * but it *may not substantially abrogate employees rights* * * *. Nor may it frustrate the policy of the Act, as Implementing Agreement 1-A clearly did in the present case." (A. 189).

In considering why the courts below found that 1-A clearly abridged employee protection, it is necessary to compare the terms of the pre-merger agreement with those of Agreement 1-A, as interpreted by N&W, i.e. the interpretation accepted by the lower courts as true. Regarding compensation protection, the pre-merger agreement guaranteed the trainmen that they would "not be deprived of employment or placed in a worse position with respect to compensation at any time during such employment * * *" (Joint Exhibit No. 1, A. 67). The formula for assuring an employee the promised compensation protection is found in Joint Exhibit No. 4 (A. 77), and basically provides that an "average monthly compensation shall be arrived at by taking the *total compensation received by* the affected employee for the last 12 months in which he performed service * * * and then dividing by 12 * * *. If the said affected employee's compensation is less in any month because of the merger than the aforesaid 'average monthly compensation,' he shall be paid the difference * * *." (A. 77).

On the other hand, post-merger agreement 1-A would all but eliminate compensation benefits to these trainmen. Under 1-A benefits would be calculated in accordance with the following formula:

> "(b) For the purposes of Section 1 of the Memorandum of Understanding effective January 10, 1962, relative to construing the above-mentioned Agreement for Protection of Employees, the 'test period' for employees covered hereby shall be the period October 16, 1963—October 15, 1964, both dates inclusive. The 'Average Monthly Compensation' for employees covered hereby shall be arrived at by taking the total compensation received by the affected employee for service performed on the former Sandusky Line of Pennsylvania Railroad during the 'test period' and divided by 12; * * *."

It should be pointed out that the foregoing formula in the post-merger agreement specifically states that it is "for purposes of Section 1 of the Memorandum of Understanding effective January 10, 1962 * * *." The significance of this provision is that Section 1 of the pre-merger agreement promises each employee an "average monthly compensation" based upon "total compensation for the last 12 months in which he performed service * * *," without any limitation as to whether that service was performed on the Sandusky Line or elsewhere within the employees seniority district. This plain fact is the basis for the holding of the courts below that agreement 1-A substantially abridged the protection promised by the pre-merger agreement.

The practical consequences of N&W's interpretation of 1-A are illustrated by the case of trainman Nemitz. Nemitz earned $7,000.00 throughout the Pennsy's Toledo Division during the 12 months before the merger. Under the formula in the pre-merger agreement, therefore, his average monthly compensation was $583.34 ($7,000.00 ÷ 12). To the extent his post-merger monthly earnings fell short of $583.34 as a result of the merger, his earnings should have been supplemented to reach that amount.

N&W contends that agreement 1-A entitled Nemitz to an "average monthly compensation" of $194.40 ($2,346.00 or his total Sandusky test period earnings divided by 12). This amount is probably less, or at least not much more, than Nemitz was entitled to receive by way of unemployment compensation from the Railroad Retirement Board. The practical importance of this fact is underscored in the "Letter of Understanding" of October 25, 1965, signed by N&W Vice President Wyatt, who referred to Railroad Retirement benefits as follows:

> "You understand that sums which individual employees may have received through the U. S. Railroad Retirement Board by way of unemployment benefits for periods during which they are paid displacement allowances by the Carrier must be withheld from the displacement allowances due the employee and remitted to that Board." (A. 91).

What this proviso meant, of course, was that N&W by delaying payments because it didn't have Pennsy earnings records was, in effect, forcing the employees who couldn't find other work to collect unemployment benefits which would have to be paid back to the Railroad Retirement Board when the limited benefits which N&W proposed to pay were actually received. The net result was that most trainmen actually received little or none of the very limited benefits which N&W purported to pay under 1-A because when these limited benefits were finally paid, N&W simply deducted any amounts which had been paid as unemployment benefits and reimbursed the Railroad Retirement Board as it is required by law to do. As shown at page 31 *supra,* the total net benefits paid to the approximately 25 trainmen, after the Railroad Retirement Benefits and overpayments under the "temporary" agreement were deducted, came to $6,494.40, or an average total of $259.77 a man for the entire 18 month period

during which these trainmen were waiting to be recalled to work at Sandusky.

The Commission has indicated that this dispute arose when "N&W said it would pay only the difference between plaintiffs' N&W wages and their average monthly wages on the Sandusky Line alone in the twelve-month period before the acquisition * * *." (Commission's brief, p. 8). This observation points up the inherent unfairness in N&W's position and, perhaps, a basic misconception about this dispute on the part of the Commission. It is, we submit, inherently contradictory to calculate "average monthly wages" on the basis of earnings for a 3 or 4, or 5 month period divided by 12. The quotient arrived at bears no relationship to average monthly earnings either at Sandusky or for the entire Toledo Division. We fail to see how such a quotient can rationally be called an "average" in any meaningful sense. Why divide by 12 if an employee worked only a third or a half of the time at Sandusky? Would it not make as much sense to divide total Toledo Division earnings by the number of months actually worked at Sandusky? The quotient arrived at would be as removed from anything reflecting an "average monthly compensation" as the formula proposed by N&W. Indeed, if N&W had proposed to pay merger benefits upon a formula reflecting "average monthly wages on the Sandusky Line alone for the twelve month period before the merger," as the Commission has suggested, this dispute would never have reached litigation. Such a formula could easily be worked out by simply taking total Sandusky Line earnings for the 12 month period and dividing *by the number of months actually worked at Sandusky during that period.* In this event, the quotient would truly reflect "average monthly earnings at Sandusky." As the deposition of Local Chairman Fitz shows, had N&W proposed such a formula the Sandusky trainmen would despite its depar-

ture from the formula provided in the pre-merger agreement, have accepted it as a means of determining their protective benefits. (See Fitz deposition pp. 56-57.)

N&W has also argued that the employees received "major additional benefits with respect to matters other than compensation which the employees were entitled to under the agreement * * *." N&W's understanding of these "major additional benefits" is summarized at p. 42 of its brief:

> "These features may be compared with the protection afforded by the agreements. First, *under these agreements,* all employees of the Sandusky Line are deemed adversely affected by the transaction with no necessity of proof of this fact. Second, the employee is guaranteed continued *employment* for his entire working life. Third, the employee has the opportunity to become employed by the Norfolk and Western and thereby to continue his residence in Sandusky, Ohio if he so wishes. Fourth, the Norfolk and Western agrees to take over and assume all contracts, schedules and agreements having application on said Sandusky Line between the Pennsylvania Railroad and the employee's labor organizations concerning rates of pay, rules and working conditions with certain minor exceptions. Fifth, both the employment and compensation protection of the agreements continue for the working lifetime of the employee.
>
> "Even when the compensation protection afforded *by the agreements* and protection of all earnings over the Toledo Division during the four year statutory period are compared, without considering other elements of protection, the protection *provided by the agreements is preferable.* While *the formula fixed by the agreements* protects less earnings during the four years immediately following the merger, it continues to offer protection beyond the four year statutory period for the full working life of the employee."

This argument is demonstrably spurious. While agreement 1-A does provide that the trainmen "are hereby certified as adversely affected as of October 16, 1964," of what benefit was it to them to be so "certified" if the only conceivable benefit in being "certified," namely, their eligibility for protective benefits, was abrogated by the very agreement which "certified" that they were adversely affected.

The second and third alleged "major additional benefits" namely, "guaranteed continued employment for . . . entire working life, and the opportunity to work for N&W at Sandusky," are unequivocally provided for in the pre-merger agreement and are not touched upon in 1-A. The pre-merger agreement states: "On the effective date of the acquisition by Norfolk & Western of the Sandusky Line presently operated by the Pennsylvania Railroad, approval for which is sought in Finance Docket No. 21512, Norfolk & Western *will take into its employment all employees* represented by the labor organizations signatory hereto, except those on furlough or leave of absence as of the effective date of this agreement or subsequent thereto up to and including the date the merger is consummated, *who during such period have exercised employment rights on said Sandusky Line and elect to accept such employment:* * * *." (A. 67).

The fourth item, namely, assumption by N&W of "all contracts, schedules and agreements * * *," is also provided for exclusively in the *pre-merger agreement*. Section 3 of the pre-merger agreement provides in pertinent part:

> "On the effective date of said acquisition, Norfolk and Western will take over and assume all contracts, schedules and agreements having application on said Sandusky Line between Pennsylvania Railroad and the labor organizations signatory hereto concerning rates of pay, rules and working conditions, * * * and

will be bound by the terms and provisions thereof subject to changes in accordance with the provisions of the Railway Labor Act, as amended, in the same manner and to the same extent as if Norfolk & Western had been a party thereto."

The final additional benefit, according to petitioner, is that "both employment and compensation protection of the agreements continue for the working lifetime of the employee." As shown above, the protective benefits promised in the *pre-merger agreement* unqualifiedly extend to "any time during * * * (N&W) * * * employment * * *." What the post-merger agreement does is destroy this protection for the precise period it was intended to cover under the pre-merger agreement.

Close analysis of these alleged "major additional benefits," therefore, reveals that only the first i.e. "certification" that the employees already out of work for over a year were adversely affected, is contained in the post-merger agreement.

It is significant that N&W in describing these "additional benefits" indiscriminately refers to the "agreements" as the source of these alleged additional benefits. This verbal lumping together of the pre-merger and post-merger agreements points up the inherently untenable position of petitioner's argument; for N&W is here (i.e. pp. 41-42 of petitioner's brief) attempting to show that the "agreements" actually gave the affected employees more than the mandatory minimum required by 49 U.S.C. Section 5(2)(f). The irony in this contention is that while it is true that the pre-merger agreements afford greater protection than the minimal requirements of Section 5(2)(f), it is equally true that post-merger agreement 1-A affords palpably less protection than this mandatory minimum. For this reason, it was only necessary for the courts below to read the agreements in question, accept

N&W's interpretation of the post-merger agreements as true, and reach the obvious conclusion that 1-A literally obliterated all meaningful compensation protection afforded the trainmen by the pre-merger agreements without giving the slightest quid pro quo. For this reason, the courts simply held that an agreement which abrogates basic merger protection, while giving nothing in return, fails to comply with the requirements set forth in Section 5(2)(f).

In so holding, the courts were following the authorities which have interpreted this provision. These authorities were succinctly analyzed by the District Court as follows:

> "Defendant will contend that Joint Exhibit 10 (sic) represents an agreement entered into pursuant to the last sentence of 49 U.S.C. Section 5(2)(f) which reads:
>
> "* * * Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carriers by railroad and the duly authorized representative or representatives of its or their employees.
>
> "Assuming that this does constitute an agreement, and assuming that it provides for protective benefits to be calculated as the N&W claims that they are to be calculated, the Court is faced squarely with the question of whether such an agreement is to be enforced.
>
> 'Numerous other courts have had opportunities to address themselves to this question: e.g., *O'Mara v. Erie Lackawanna R.R.*, 407 F.2d 647 (2nd Cir. 1969); *Flaherty v. Kansas, Oklahoma and Gulf R.R.*, 252 F. Supp. 736 (E.D. Okla. 1966); *Roberts v. Lehigh & New England R.R.*, 323 F.2d 219 (3rd Cir. 1963). The courts in these cases simply assumed that the

agreement was in compliance with the statute and proceeded to consider whether this provision of the statute permitted the carrier and the union to change the I.C.C. order. In all of these cases it was held that it did. The ability to entirely rewrite the protective agreement does not necessarily imply the ability to lessen the Congressionally established minimum protection.

"The court in *Arnold v. Louisville & Nashville R.R.*, 180 F. Supp. 429 (M.D. Tenn. 1960), *aff'd sub nom., Batts v. Louisville & Nashville R.R.*, 316 F.2d 22 (6th Cir. 1963), interpreted the provision of the statute in question as follows:

> "Thus, while the statute requires the Commission to make provisions for the protection of employees adversely affected, it specifically reserves to the railroad employees the right, through their duly authorized representatives, to enter into an agreement with the railroad as to terms, conditions and arrangements for their own protection. Under this provision of the statute, as the Court construes its meaning and effect, the employees may, through a collective bargaining agreement with the railroad, make provisions for their own protection by *adopting, supplementing* or *implementing* the provisions made by the Commission for their protection. 180 F. Supp. at 433-34.

"This interpretation of the statute was adopted by the District Court in *Clemens v. Central R.R. of New Jersey*, 264 F. Supp. 551 (E.D. Pa. 1967) *rev'ed on other grounds*, 399 F.2d 825 (3rd Cir. 1968). This Court accepts this interpretation, that is that the agreement can alter, supplement, or vary the I.C.C. order so long as it does not abridge the protection afforded by the statute or the I.C.C. order."

In summary, the lower courts found, as a matter of fact, that the post-merger agreements abridged Section 5(2)(f) protection and were, therefore, unenforceable as

a matter of law. It is respectfully submitted that unless the third sentence of Section 5(2)(f) is construed to be a carte blanche invitation to carriers and employee representatives, whether by design or otherwise, to destroy employee protection afforded by statute or Commission Order, the rulings of the courts below with respect to agreement 1-A should be affirmed.*

IV. THE TRAINMEN ARE NOT BARRED FROM SUING BECAUSE OF THE EXHAUSTION OF REMEDIES DOCTRINE BECAUSE (A) THEY, IN FACT, EXHAUSTED EVERY ADEQUATE REMEDY AVAILABLE TO THEM; (B) THE ARBITRATION CLAUSE IN QUESTION WAS OPTIONAL, AND SINCE NEITHER N&W NOR THE UNION INVOKED ARBITRATION, THAT REMEDY WAS NOT MANDATORY; AND (C) THE DOCTRINE OF EXHAUSTION OF REMEDIES SHOULD HAVE NO APPLICATION IN A SUIT BY ADVERSELY AFFECTED RAILROAD EMPLOYEES FOR BENEFITS CONFERRED UNDER 49 U.S.C. SEC. 5(2)(f).

The lower courts rejected N&W's contentions respecting the exhaustion issue on two grounds: (1) the doctrine of exhaustion pre-supposes the existence of an adequate remedy, and since the record clearly shows that the trainmen "had reached a dead-end street in their attempt to utilize union remedies," they were not barred from suing by any failure to exhaust administrative remedies; and (2) the arbitration provision in the 1962 agreement

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* The trainmen at the trial level vigorously disputed N&W's contention that agreement 1-A was ever intended to govern the claims of trainmen with less than 12 months Sandusky earnings before the merger. They based their position on numerous documents of record, as well as documents and evidence which would have been presented had a trial been required. If, therefore, this court should, for any reason, find that agreement 1-A is enforceable, the trainmen at the very least are entitled to have this cause remanded to the District Court for a determination of the factual dispute as to the intent and scope of that agreement.

was "permissive," and, since neither the union nor the N&W had invoked arbitration, jurisdiction was not precluded on these grounds (A. 189-190).

After reading the entire record, the court of appeals concluded that it was "readily apparent from the record" that "it would have been a futile gesture for the appellees to have attempted to proceed further with the arbitration procedure * * *" (A. 192). This certainly understates the plight of the trainmen, who have described in some detail the three year effort which they made to get their claim for benefits paid under the terms of the January 10, 1962 agreements. This factual background, considered in the light of this Court's pronouncements in *Republic Steel v. Maddox,* 379 U.S. 650 (1965), and *Vaca v. Sipes,* 386 U.S. 171 (1967), suggests several compelling reasons, as a matter of law and policy, for upholding the court of appeals finding that "appellees in this case have fulfilled any possible requirement for exhaustion of administrative remedies * * *."

(1) The trainmen's claims are for monetary protection explicitly promised them by the terms of an agreement intended to meet the requirements of Section 5(2(f) of the Interstate Commerce Act. That Act obviously has as a primary policy objective the protection of railway employees against the monetary hardships which frequently result from the disruptive effects of rail mergers. It seems clear from the thrust of the Interstate Commerce Act that Congress intended that this policy objective would override potentially conflicting policies of federal law, so far as necessary to fulfill this objective. 49 U.S.C. Section 5(11), for instance, relieves carriers and employees of all restraints of law, so far as necessary to fulfill the objectives of the Act. Furthermore, the very context from which disputes such as the one at hand will often spring

differs in kind from that generally giving rise to questions of the proper application of the exhaustion of remedies doctrine. In addition to causing disruption of prior employer-employee alignments, Section 5 transactions will, of necessity, also frequently upset employee-union alignments. This fact is apparent in the instant case.

On October 15, 1964, these trainmen were Pennsy employees and members of local lodge 844. Their General Grievance Committee was made up predominantly of local unions of Pennsy employees with a few locals from the Detroit, Toledo, and Ironton R.R., Chicago Union Depot Co., and Dining Car Stewards. The following day they were N&W employees in one of two local lodges (Columbus and Sandusky) made up of N&W employees among 53 local lodges in a General Committee which for the first time now represented N&W employees. This observation is meant to call attention to the obvious fact that claims of adversely affected employees for Section 5(2)(f) benefits following a rail consolidation may bear little similarity, in fact, to the traditional grievance claims of employees in the context of a stable, ongoing employer-union-employee relationship. In this regard, the Supreme Court has seemed to recognize that situations may arise wherein it would be inappropriate to even hold that an employee must attempt use of the contract grievance procedure. In *Maddox*, the Supreme Court made the following observations regarding the exhaustion of remedies under federal law at 379 U.S. 653, 654:

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences

may arise as to the forms of redress then available.* * *

"Once it is established that the federal rule discussed above applies to grievances in general, it should next be inquired whether the specific type of grievance here in question—one relating to severance pay—is so different in kind as to justify an exception."

Maddox thus raises the question whether the claims of adversely affected employees for Section 5(2)(f) benefits in the aftermath of a rail merger is so different in kind as to justify an exception to the rule that employees must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress. While the courts below impliedly either answered this question in the affirmative, or overlooked it by deciding as they did, respondents urge this Court to hold that claims of rail employees in this context justify the conclusion that the application of the federal exhaustion doctrine in this narrow situation would be inappropriate as tending to undercut the primary protective objectives of 49 U.S.C. Section 5(2)(f).

(2) Assuming, however, that the application of the exhaustion of remedies doctrine to the type of dispute at hand is deemed appropriate, the question arises as to what should be required of employees in the position of the respondent trainmen before it can be said they have made a sufficient attempt to use the available administrative remedies. The Supreme Court framed this question as follows in *Maddox* at 379 U.S. 652:

"If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. See *Humphrey v. Moore*, 375 U.S. 335, 11 L. ed. 2d 370, 84 S. Ct. 363; *Labor Board v. Miranda Fuel Co.*, 326 F.2d 172."

Trainmen submit that the practical exigencies of their situation following the instant merger support the lower court's ruling that the "form or redress" they chose was, *if not the only possible remedy available to them,* at least a proper one.

The record shows that the union waited for nearly a year before attempting to invoke arbitration with respect to the trainmen's claims. By that time, however, there was clearly nothing to arbitrate except the possible question of whether N&W was excused from paying benefits because Pennsy's earnings records were allegedly not available. Respondents submit that the union's delay in pressing for arbitration against this factual background was, in itself, sufficient justification for filing suit. Certainly Congress could not have envisioned that the protective scheme of the Interstate Commerce Act would operate so that payments of benefits to adversely affected employees, at the time they were most urgently needed, would hinge on such fortuities as whether or not the promising carrier had taken timely pains to get earnings records, or whether or not the employee's union was diligent or perfunctory in the handling of their claims. As set forth above, the delay in making benefit payments forced the trainmen to seek unemployment benefits which eventually had to be refunded from the very limited merger benefits which were, in fact, finally paid nearly two years after the merger. The point is that claims for merger related compensation protection will often arise in circumstances where delay in payment will all but negate the purpose of conferring protection in the first place; so that, from the employees point of view, the ameliorative purposes of the Act will be reduced to a mockery unless access to prompt relief is at hand. At any rate, the employees in the instant case did everything possible for

three long years to exhaust their remedies. It is doubtful from the record that they would have been in any different position if they had tried for another three years to get relief short of litigation.

N&W urges that *Bonnot v. Congress of Independent Union's Local No. 14*, 331 F.2d 355 (8th Cir. 1964), is in conflict with the authorities cited by the courts below to support their finding that arbitration language in question is "permissive." In analyzing N&W's *Bonnot* argument, the Appeals Court commented as follows:

> "In *Bonnot*, the Court of Appeals made the statement, quoted *supra*, which in effect characterized the 'may' clause as absolutely mandatory, relying upon *Steelworkers v. American Manufacturing Company*, 363 U.S. 564 (1960) and *Deaton Truck Line, Inc. v. Local Union #612*, 314 F.2d 418 (5th Cir. 1962). The *Deaton Truck Line* case interpreted the *American Manufacturing Company* case, and citing that case the Court of Appeals stated:
>
> > "Clearly, however, 'may' should be construed to give either party the option to require arbitration. *Deaton Truck Line, Inc. v. Local Union #612, supra*, p. 422.
>
> "Thus the cases cited by *Bonnot* do not compel the conclusion reached by the Eighth Circuit that the 'may' clause is absolutely mandatory, in the sense of requiring either arbitration or abandonment of the aggrieved party's claim" (A. 191).

Bonnot, of course, is sharply distinguishable on its facts from the instant controversy since there was not even an assertion by the plaintiff in *Bonnot* that there had been even the slightest attempt to use the arbitration procedures called for by the contract in question. Thus *Bonnot* would not control the outcome here even if the courts below had construed the contractual arbitration language as being mandatory.

Bonnot, further, involved an action brought under Section 301 of the Labor Management Relations Act. Assuming that this court agrees that the "may" clause in the context which gave rise to the dispute in *Bonnot* was absolutely mandatory, in the sense of requiring either arbitration or abandonment of the aggrieved party's claim, and that this is so even where the grievant has done everything possible to exhaust his administrative remedies—which *Bonnot* did not hold—trainmen submit that the lower courts' interpretation of the "may" clause in the instant case was, nevertheless, clearly correct. If the "may" clause here is interpreted as giving employees who are denied benefits the option of arbitration only if their union agrees to do so or abandonment of their claims if the union decides not to arbitrate, the protective promises of the Act, the Commission's order, and the pre-merger agreement, in cases like the instant one, will be reduced to nothing less than a cruel hoax. Trainmen submit that neither *Bonnot* nor any other authority justify such a result.

(3) Finally, petitioner has argued that *Vaca v. Sipes* precludes the trainmen from suing their employer unless the employee can prove that the union "breached the duty of fair representation," which the respondents, according to N&W, have failed to show. Respondents submit that the holdings of the courts below are consistent with this court's reasoning in *Vaca* in all material respects. In considering petitioner's *Vaca* argument the Court of Appeals stated:

> "Appellant calls our attention to the case of *Vaca v. Sipes, supra,* an employee action against the union for breach of its duty of fair representation, wherein the Supreme Court indicated that exhaustion was not excused unless the employee proved that the union had breached its statutory duty of fair representa-

> tion. To constitute such a breach, the union must have acted in an arbitrary, discriminatory, or bad faith manner. However, the Supreme Court also indicated in *Vaca v. Sipes* that an exception to the exhaustion requirement may exist where the effort to proceed with further administrative remedies would be futile. In the later case of *Glover v. St. Louis-S.F.R. Co.*, 393 U.S. 324, 330 (1969), the Supreme Court affirmatively recognized the validity of this exception. *That it would have been a futile gesture for the appellees to have attempted to proceed further with the arbitration procedure, is readily apparent from the record before us.*" (A. 192). (Emphasis added.)

Petitioner, of course, criticizes the Court of Appeals citation of *Glover* as having "no conceivable application to the present controversy." (Petitioners' brief, p. 57). It is submitted, however, that while *Glover* is obviously factually dissimilar to the case at hand, the rationale of the decision has striking application to the facts in the present case. In *Glover*, the court concluded that where "the bargaining representatives of the car employees have been acting in concert with the railroad employer to set up schemes and contrivances to bar Negroes from promotion wholly because of race" the plaintiffs "should [not] be required to submit their controversy to 'a group which is in large part chosen by the [defendants] against whom their real complaint is made.'" If, however, the post-merger agreements in the present case substantially destroy all merger protection of these trainmen and if, as N&W contends, the union intentionally contracted to do this, the trainmen would be as palpably helpless in the matter of obtaining merger protection here, as the Negro union members in *Glover* would have been if they had been required to leave the matter of promotions to the

processes of arbitration. N&W impliedly recognizes this fact since it takes pains to argue that:

> "In the present case, the determination by respondents' collective bargaining representative that respondents' claims were without merit and did not warrant submission to arbitration was clearly a reasonable and informed decision. Respondents' collective bargaining representative had negotiated *agreements* with the N&W which clearly fixed respondents' protective benefits. Moreover, the benefits available to the respondents *under the agreements* thus made were substantial and preferable in many respects to the benefits which might have been prescribed by the Commission in the absence *of such agreements* (as discussed at pp. 41-45, *supra*)." (Petitioners' brief p. 58).

This argument impliedly recognizes that unless the post-merger agreement does not abrogate merger benefits, its *Vaca* argument falls of its own weight. As shown above, the "benefits" to which N&W is referring are entirely contained in the pre-merger agreement, whereas the post-merger agreements destroy all meaningful protection contained in the pre-merger agreements. Here again petitioner attempts to gloss over and blurr this critical distinction by indiscriminately lumping the pre and post-merger agreements together under the term "agreements" so as to give the false impression that the latter actually conferred benefits upon the trainmen.

In any event, the rationale in *Vaca* completely supports the decision of the lower courts on the exhaustion of remedies question. *Vaca*, of course, involved the question of whether the Garmon* pre-emption doctrine applied to an employee's suit against his union for alleged

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* *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L. ed. 2d 775, 79 S. Ct. 773.

breach of the union's fair representation duty. There the union had processed the grievant employee's claim for wrongful discharge because of medical reasons into the fourth of five possible steps in the contract grievance procedure. At this point, it received information from a doctor hired by the union to help support grievant's claim which, in fact, *did not support grievant's claim.* The union was satisfied that there was insufficient medical evidence to support grievant's position. The grievant employee balked at this suggestion and demanded that the union, notwithstanding this contrary medical evidence, proceed to arbitration. When this request was refused, the employee sued the union for failing to press his claim through the final step of arbitration.

This court held that the suit was essentially one under Section 301 of the Labor Management Relations Act (29 U.S.C. Section 185) over which the courts have jurisdiction even though the employer's conduct is arguably an unfair labor practice within the jurisdiction of the National Labor Relations Board. On the exhaustion of remedies question the court said:

> "However, if the wrongfully discharged employee himself resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted. Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee *must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement.* Republic Steel Corp. v. Maddox, 379 US 650, 13 L ed 2d 580, 85 S Ct 614. However, because these contractual remedies have been devised and are often

controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures." 386 U.S. 171, 17 L. ed. 2d 842, 87 S. Ct. 903.

Trainmen submit, therefore, that for several reasons *Vaca* is fully consistent with the rulings below: (1) the record convincingly shows that the trainmen attempted use of the grievance procedure; (2) the union's handling of the trainmen's grievances—if indeed they can be aptly characterized as mere grievances—was at best dilatory and perfunctory; (3) *Vaca* is critically distinguishable from the instant case in that *Vaca* presupposes a situation where the union has utilized available administrative processes but has chosen in good faith and for good cause to discontinue processing grievant's claim short of the final step in the administrative process. Here, despite the fact that N&W had not even a color of right for delaying promised benefits for over a year following the merger, and despite the fact that when benefits were paid they were grossly less than what was promised these men *before* they elected N&W employment, the trainmen nevertheless were denied any opportunity to seek their remedy under the contract; and (4) *Vaca*, finally, is distinguishable in that it presupposes a stable employer-union relationship in which the union has a legitimate concern in seeing that the common law of the plant is permitted to develop unhampered by time consuming, frivolous grievances. In the instant case, none of these objectives are jeopardized by permitting adversely affected employees access to the courts. Here the claims of the trainmen are for monetary protection which became due *before* they were ever called

back to work at Sandusky following the merger. Obviously trainmen's claims are not frivolous; and, after nearly three full years of temporizing with the trainmen's claims, of fruitless letter writing and meetings, the union can hardly be heard to complain that its influence will be undermined by permitting the trainmen to resort to litigation.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

THOMAS J. MURRAY, JR.,
Attorney for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-97

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

RICHARD NEMITZ, et al.,
Respondents.

ON WRIT OF CERTIORARI
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FOR THE SIXTH CIRCUIT

OBJECTION TO MOTION OF UNITED TRANSPORTATION UNION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

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October, 1971

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Petitioner Norfolk and Western Railway Company objects to the filing of an amicus curiae brief on behalf of the United Transportation Union on the following grounds:

(1) The motion was not timely presented as required by Rule 42(3) of this Court's Rules of Practice.

(2) The motion does not set forth facts or questions of law that have not been adequately presented by the parties, as required by Rule 42(3) of this Court's Rules of Practice.

(3) The brief sought to be filed, to the extent it deals with issues relevant to the resolution of this action, is simply a recital of arguments already made by respond-

ents. The brief also seeks an advisory opinion regarding important questions of federal law which are not raised by the facts of this case, which have no relevance to a decision of this case, and which have not been briefed by the parties.

Objection No. 1

Rule 42(2) permits the filing of an amicus brief only upon consent of the parties or order of Court and indicates that the appropriate time for filing is "within the time allowed for the filing of the brief of the party supported". Rule 42(3) requires that a motion for leave to file be "timely presented". In this context, the requirement of timely presentation must mean that the motion must be filed in time to permit appropriate consideration and a ruling by the Court prior to the due date for the brief of the party supported. In this case, the motion for permission to file an amicus brief was presented on the date that the brief of the party supported was due. Such a procedure clearly does not allow the Court to consider and rule on the motion prior to the proper filing date for the brief. It must be concluded, therefore, that the motion was not timely filed in accordance with the requirement of the Rule.

There can be no excuse for this disregard of appropriate procedure since the UTU has been aware of the pendency of this case since its initiation in the District Court. UTU is, in fact, a party to the District Court action which resulted in the order now under consideration by this Court. The UTU, despite the fact that it was and is a party to this action in the District Court, chose not to participate in any way in the appellate stages of this proceeding until the filing of the present motion. It should not be allowed to appear as a friend of the Court at this late date in violation of the Court's own rule.

The action of the UTU in this regard is particularly objectionable because other railway labor unions wishing to

participate in this proceeding in support of petitioner's position have refrained from doing so in voluntary compliance with the very rule which UTU has chosen to ignore. Shortly after petitioner had filed its brief herein, the representative of an association, consisting of fourteen railway labor organizations, which was instrumental in the negotiation of the protective agreements involved in this proceeding and the protective agreements resulting from many other railroad consolidations, discussed this case with petitioner. This representative expressed the association's view that the petitioner's interpretation of Section 5(2)(f) of the Interstate Commerce Act was correct and that the Court of Appeals' decision would hamper the collective bargaining process in connection with railroad consolidations. This representative also expressed interest in submitting an amicus brief to this effect. Despite the fact that the association had only recently become aware of the present proceeding, the association abandoned the idea of filing an amicus brief because the timeliness requirement of Rule 42 could not be met. Under these circumstances, granting the UTU permission to file its brief would reward a disregard of the requirements of Rule 42 and penalize adherence to the provisions of that rule.

Objection No. 2 and No. 3

Rule 42(3) specifically requires that motion for leave to file "set forth facts or questions of law that have not been . . . adequately . . . presented by the parties. . . ." The motion filed by the UTU makes no attempt to comply with this requirement. While stating in conclusory fashion that it has interests which differ from those of the parties, it does not state what these differences are or whether or not they render the presentation of the issues by the parties inadequate. The majority of the UTU's brief is devoted to a statement of facts and arguments identical to those contained in respondents' brief, couched in phraseology closely

following the phraseology utilized by respondents. The parroting of respondents' arguments in a brief filed on behalf of the UTU serves no useful purpose and will not aid the Court in the resolution of this case.

The portion of the UTU brief which does not duplicate respondents' arguments raises questions as to a union's right to strike to compel an employer to enter into agreements protecting employees from the effects of a railway merger, and whether the procedures of Section 6 of the Railway Labor Act apply to the negotiation of such agreements. These are highly complex issues never before decided by this Court, not raised by the parties to this proceeding, and totally unrelated to the facts surrounding this controversy. The issues in the present case revolve around the jurisdiction of federal courts to construe and invalidate protective agreements previously entered into by labor and management without a strike, the threat of a strike, or the assertion or negation of a right to strike. The case thus involves no question concerning the procedural steps leading to the agreements but only the lawfulness and meaning of the agreements. The new issues raised by the UTU cannot properly be considered or resolved in this context.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-97

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

RICHARD NEMITZ, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Preliminary Statement

Respondents' basic purpose in this litigation is to impose upon the judiciary the function of interpreting collective bargaining agreements and supervising the efforts and results of the parties to the collective bargaining process. The effort is made in this case for the purpose of establishing, through judicial intervention, an interpretation of such agreements which is contrary to the interpretation arrived at by the parties who negotiated and executed them. After a most exhaustive and complete investigation of the claims which respondents asserted below and reiterate here, the Brotherhood of Railroad Trainmen decided that the collective bargaining agreements at issue were not subject to

the interpretation urged by the respondents (A. (I) 147-50).* Accordingly, the Brotherhood of Railroad Trainmen, as the collective bargaining representative of respondents, ruled that there was no issue between it and the N & W with respect to the meaning of the agreements and that there was thus no reason to invoke arbitration (A. (I) 147-50). It is in the context of this prior determination by the Brotherhood of Railroad Trainmen, a determination which was made on the basis of a full and complete consideration of the issues, that the present effort of respondents to expand the traditional and appropriate function of the judiciary must be appraised.

The brief for the United States and the Interstate Commerce Commission herein emphasizes the fundamental error of respondents' position and the decisions below, stating (p. 12):

> "The decision of the court of appeals would require the Commission to intrude on the collective bargaining process by altering the terms of previously negotiated agreements. The result would necessarily be to discourage settlement of these matters in the future through negotiation, and thus would contravene the strong congressional policy in favor of having labor differences settled through collective bargaining rather than having agencies or courts impose settlements on labor and management."

Despite the importance and complexity of the questions presented, respondents' brief is devoted in large part to matters which are irrelevant to the issues before this Court and to contentions, factual in nature, which are contrary to the record. In this category are (1) the contention that

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* References in this form are to the printed appendix in this Court. The parenthetical numeral indicates the volume of the appendix in which the material referred to may be found.

respondents' interpretation of the 1962 Agreement is the only reasonable one; (2) the claim that Implementing Agreement 1-A was a temporary agreement not intended to fix a permanent formula for calculating respondents' protective benefits; (3) the related contention that the Letter of Understanding of October 25, 1965 expresses a view of respondents' protective benefit rights consistent with respondents' interpretation of the 1962 Agreement; and (4) the attempt to show that the decision of the BRT's National Board of Appeals was consistent with respondents' interpretation of the 1962 Agreement.

The decisions below are not based on a resolution of these factual issues in favor of respondents. The judgment appealed from resulted not from a trial but from the denial of two motions for summary judgment filed by N & W and the granting of a motion for summary judgment filed by respondents. In order to resolve the controversy at the motion stage, the courts below were required to and did assume that N & W's position with regard to these factual questions was correct. Thus, the decisions below can only be affirmed if this Court holds, as did the lower courts, that the Commission and the judiciary may appropriately construe and invalidate collective agreements entered into in good faith by the N & W and the authorized collective bargaining representatives of its employees and may appropriately ignore the good faith outcome of the grievance procedure created by the agreements.

While these matters are not relevant to the questions presented by this case, respondents' discussion of them is obviously designed to frustrate objective consideration of the important issues presented. We believe it necessary, therefore, to correct certain major misrepresentations contained in respondents' presentation.

ARGUMENT

I. RESPONDENTS' CONTENTIONS REGARDING THE INTERPRETATION OF THE 1962 AGREEMENT, IMPLEMENTING AGREEMENT 1-A, THE 1965 LETTER OF UNDERSTANDING, AND THE DECISION OF THE BRT NATIONAL BOARD OF APPEALS ARE UNSUPPORTED BY THE RECORD IN THIS CASE.

The recurring position taken by respondents is that their interpretation of Section 3 of the 1962 Agreement is the only possible one and that any contrary opinion is necessarily arbitrary. Respondents' entire position in this regard is based on the following phrase:

> "None of such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment except that Norfolk & Western shall not be required to provide employment to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition." (A. (I) 67).

Respondents' view is that the first portion of this phrase guarantees two distinct types of protection and that the second part limits only one of these types of protection, leaving the other unaffected. Respondents necessarily assume that the word "employment" is used in the limitation portion of the protective phrase to refer only to the employees "right" to perform services and is not used, as it is most commonly, to comprehend the entire employment relationship, including both the performance of service and the payment of compensation. When the nature of the protection provided by the 1962 Agreement is considered, it is clear that repondents' basic assumption is erroneous.

The protection provided by the 1962 Agreement differed significantly from that contemplated by Section 5(2)(f) of the Interstate Commerce Act which is, essentially, a guarantee of monetary payments whose size and duration are determined by the employees' previous earnings. The parties to the 1962 Agreement were providing, instead, a guarantee of continued employment as that term is ordinarily used. It was contemplated, that is, that the employees would continue to work and earn compensation after the merger just as they did before. To accomplish this purpose, the agreement recited that the employees would not be deprived of employment or placed in a worse position with respect to compensation. This dual phraseology was necessary not because an employment guarantee would not include a compensation guarantee but because the word "employment" as used in Section 5(2)(f) had been held to refer only to compensation (*Brotherhood of Maintenance of Way Employes* v. *ICC*, 366 U.S. 169 (1961)). Thus, in order to insure that the agreement was interpreted as providing employment protection rather than a guarantee limited to monetary payments, the parties utilized the dual phrase which appears in the agreement.*

The parties, having utilized the dual phraseology to make it clear that they intended to provide true employment protection, reverted in the limiting clause to the utilization of the word employment in its ordinary sense to denote the

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* This phrase originally appeared in the Emergency Railroad Transportation Act. In *Brotherhood of Maintenance of Way Employes* v. *ICC*, 366 U.S. 169 (1961), this Court referred to the phrase as providing true employment protection. In describing the protection afforded by the 1962 agreement through utilization of the dual language, the Interstate Commerce Commission Examiner referred to that language as meaning that "employees would not be adversely affected in their employment", obviously using the word employment in its ordinary sense. (324 Ill. 89)

entire employment relationship. Thus, the parties, satisfied that they had provided for maintenance of the full employment relationship, proceeded to limit this protection for employees covered by Section 3 to the employment previously enjoyed by each individual on the Sandusky Line. In effect, the parties stated that employees covered by Section 3, who chose to continue work on the Sandusky Line by electing employment with the N & W, would be no worse off with regard to their employment *on the Sandusky Line* in the future than they had been in the past.

This is the most logical interpretation of Section 3 of the 1962 Agreement, taking into account the entire agreement, the history of merger protection in the railroad industry, and the circumstances of the transaction involved. Moreover, there can be no question that this interpretation is the only one in accord with the intention of the parties and their practical application of the agreement.

The letter written by H. C. Wyatt, Vice President of the Norfolk & Western, to F. D. Montgomery, Vice President of the BRT, summarizing the discussion of the 1962 Agreement which took place at the time the BRT signed it, illustrates the understanding of the parties in this regard. This letter was written April 23, 1962, the same day the agreement was signed by the BRT. It states (A. (I) 94-95):

> ". . . Mr. Noell and I outlined to you and Mr. King our intentions with respect to PRR employees of your representation involved in our purchase of the so-called Sandusky Line. . . .
>
> "At a reasonable time prior to the effective date of the merger, PRR employees working or having seniority on the Sandusky Line would be given the election of severing their relationship with the PRR and establishing employment rights on the new Sandusky District or exercising their seniority on other districts of the PRR.
>
> "The protection afforded these employees of the PRR

would be in direct ratio to service *on the district* in the previous 12 months" (emphasis added).

No reply disputing this summary was ever received by the N & W, and this letter was part of the record on which the BRT Board of Appeals held that respondents' interpretation of the agreement was without merit. Thus, on the very day on which the agreement was signed, Mr. Wyatt confirmed the understanding of the parties that the protection provided by Section 3 (both job and compensation) was limited by the employee's service (duration of employment) on the Sandusky Line in the year prior to the merger.

N & W's interpretation of Section 3 is confirmed by the language of that section dealing with the protection to be afforded Pennsylvania employees displaced by an employee with service on the Sandusky Line who elected not to accept employment with the N & W. Respondents acknowledge that the compensation protection afforded to a displaced employee was limited to the Sandusky Line earnings of the displacing employee. Respondents state that this limitation was necessary to discourage those who worked primarily on portions of the Toledo Division other than the Sandusky Line from electing employment with the N & W and that the recognition of this fact is "critically important to understanding the events which gave rise to the dispute" (Respondents' Brief, p. 8). Respondents' recognition of this "critically important" fact is somewhat belated since they argued in the courts below that under Section 3 displaced employees were clearly entitled to protection based on the compensation of the displacing employee over the entire Toledo Division.*

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* The brief which respondents filed with the District Court in March, 1968, in support of their motion for summary judgment contains the following argument with regard to the protection provided displaced employees by Section 3:

"What is significant about these provisions, however, is that

Respondents' most recent position with regard to the protection afforded these displaced employees is clearly the correct one. The only reason for basing a displaced employee's protection on the earnings of the employee who displaces him, rather than on his own earnings, is to insure that the protection afforded can be related to work performed and compensation earned on the Sandusky Line. If the object was simply to protect the displaced employee from the adverse effects of the merger, the displaced employee's own earnings would be controlling.

The inescapable conclusion from respondents' current position with regard to displaced employees is that the protection afforded respondents by Section 3 is also limited to their earnings on the Sandusky Line. The language of Section 3, referring to the protection afforded displaced employees, indicates that their compensation protection will be determined by the earnings of the displacing employee but does not indicate that only the displacing employee's earnings on the Sandusky Line will be utilized. It is only possible to conclude that the displaced employee's protection is limited to the displacing employee's earnings on the Sandusky Line if it is also concluded that the displacing employee himself would, under Section 3, be entitled to only

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nowhere do they provide that the protective benefits of the displaced Toledo employee will be limited to *the Sandusky Line earnings only* of the displacing employee during the twelve-month-pre-acquisition period referred to. The language simply limits the displaced employee's protective benefits to no greater amount than was 'paid to the Sandusky Line employee . . . in the twelve-month period immediately preceding the effective date of said acquisition.' Since all the Sandusky Line employees enjoyed rights throughout the entire Toledo Division, there is no reason to infer from the Section 3 language that the twelve months earnings of the displacing employee, to be used to put a ceiling on these protective benefits, would necessarily have to be limited to Sandusky Line earnings." (p. 23)

this level of protection. Since the displaced employee is guaranteed "all the protective benefits of this section", it must be concluded that Section 3 provides a guarantee limited to Sandusky Line compensation in order to reach the further conclusion that only the displacing employee's Sandusky Line earnings need be considered. In short, the only possible method of construing Section 3 to limit displaced employees' compensation protection to Sandusky Line earnings is to conclude that all compensation protection afforded by Section 3 is limited to Sandusky Line earnings.

Respondents' admission that it was necessary for the parties to discourage employees, whose primary work connections were with portions of the Toledo Division other than the Sandusky Line, from electing employment with the N & W also demonstrates that Section 3 must be interpreted to limit compensation protection to Sandusky Line earnings for all Toledo Division employees. If an employee who engaged in any work on the Sandusky Line could elect employment with the N & W with a guarantee based on his full compensation over the entire Toledo Division, many employees who worked only briefly on the Sandusky Line, and whose primary employment connection was, therefore, not with the Sandusky Line, would have been encouraged to accept employment with the N & W. Moreover, the only reason for discouraging employees from electing employment on the Sandusky Line was to prevent unneeded employees from electing employment with the N & W. A limitation of the protective benefits only for displaced employees would not have accomplished this purpose. The employees involved preferred to work at Sandusky and a guarantee of full compensation to all employees with previous Sandusky service would have insured that all those eligible would elect employment with the N & W. In that event, no displacement of employees would occur on other portions of the Toledo Division. Moreover, limitation of the protection afforded displaced employees would not discourage them

from electing employment with the N & W since such employees, having been displaced, would have no realistic alternative.*

The Letter of Understanding, Implementing Agreement 1-A, and the decision of the BRT Board of Appeals also support N & W's interpretation of Section 3. The Letter of Understanding stated that 75% of each employee's total earnings on the entire Toledo Division would be used as the basis for making temporary benefit payments until a breakdown between compensation earned on the Sandusky Line and other Toledo Division compensation could be obtained. (A. (I) 89-91). This letter, signed by representatives of both the N & W and BRT, is consistent only with the view that the protective benefits for the employees involved were based on their earnings on the Sandusky Line in the 12-month period immediately preceding the merger. If this were not true, no need for a temporary arrangement would exist since, as the letter states, the N & W was already in possession of the total Toledo Division earnings of each employee.

Implementing Agreement 1-A, entered into simultaneously with the Letter of Understanding, provided a

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* Respondents attempt to draw a distinction between "Sandusky Line employees" and "former Pennsy employees whose employment connection was not with the Sandusky Line" (Respondents' Brief, pp. 6-7). Prior to the merger, however, all employees working on the Toledo Division (which included the Sandusky Line) were Pennsylvania employees with the right to work throughout that Division. A single seniority roster was maintained for all such employees and whether a particular employee worked on the Sandusky Line or elsewhere on the Toledo Division was solely a reflection of his personal preference, his seniority standing, and the work available on the various portions of the Division. Respondents abandon this spurious distinction where it suits their purposes and, referring to themselves, state "these trainmen were Pennsy employees" (Respondents' Brief, p. 89).

formula which was to be used to calculate respondents' permanent benefits when Sandusky Line earnings were received from the Pennsylvania. This formula was consistent only with the N & W's view of the meaning of Section 3 (Pet. Brief, p. 13). Implementing Agreement 1-A did not provide for any immediate payments to the employees and met no other temporary need. The only possible reason for its existence was to provide a formula for future use when Sandusky Line earnings were received.

When Sandusky Line earnings were actually received, the BRT and N & W attempted to authenticate figures received and to calculate the actual amounts due. The N & W representative in these discussions testified that in determining the amount of benefit payments to which respondents were entitled, he was guided by the formula in Implementing Agreement 1-A and that on February 20, 1967, the parties agreed on final figures based on the formula in that agreement (Yancey Deposition, pp. 7-8, 13, 20-21, 24-25, 30-31, 49-51).

A careful reading of the decision of the BRT Board of Appeals (A. (I) 113-150), reveals that the Board concluded that the N & W position with regard to the meaning of Section 3 was correct. The Board stated (A. (I) 149):

> "In the instant case there is no . . . disagreement between our Brotherhood and the Norfolk and Western."

The Board thus approved the N & W position with regard to the meaning of Section 3. The N & W position in this regard had been outlined for the Board by T. E. Fitz, respondents' local chairman, as follows (A. (I) 116):

> "The management of the N & W . . . contend they are only obligated to protect these men for monies earned performing service on the 111 miles of road between Columbus and Sandusky and the Sandusky yards, thereby dividing their earnings for the purpose of

establishing a test period. They also contend they are only required to use earnings from October, 1963, until October, 1964."

J. F. McNeel, General Chairman of the BRT and the individual who negotiated Implementing Agreement 1-A for the BRT, successfully opposed Fitz's appeal, urging the correctness of the N & W's interpretation of Section 3 of the agreement. In referring to Section 3, McNeel stated (A. (I) 136-137):

> "From the language in this Agreement, it can be clearly adduced that the trainmen who formerly worked on the Pennsylvania Railroad and exercised their option to transfer to the Norfolk and Western Railway Company are entitled, for the purpose of determining the amount of 'Certified Test Period Earnings,' only to the amount of monies earned on the Sandusky District during the twelve (12) months immediately preceding the effective date of the merger ..."

The BRT Board of Appeals, finding no disagreement between the BRT and the N & W as to the meaning of Section 3 of the 1962 Agreement, thus rejected respondents' interpretation. The representations to the contrary, which appear in respondents' brief in this Court, are clearly incorrect.

II. THE CLAIM THAT A RAILWAY MERGER MAY AFFECT AN EMPLOYEE'S POLITICAL INFLUENCE WITH HIS COLLECTIVE BARGAINING REPRESENTATIVE DOES NOT JUSTIFY THE JUDICIAL INTERVENTION IN THE COLLECTIVE BARGAINING PROCESS WHICH RESPONDENTS SEEK IN THIS PROCEEDING.

Respondents state that the purchase of the Sandusky Line by N & W reduced their political effectiveness within

their union, that other employees involved in rail consolidations may have a similar experience, and that this justifies a statutory interpretation of Section 5(2)(f) severely limiting the authority of unions to enter into binding agreements and grievance settlements in a merger situation. What respondents complain about, however, is not unique to merger situations but is inherent in all collective bargaining.

Both the Railway Labor Act and the Labor Management Relations Act provide that a majority of the interested employees may choose the exclusive bargaining representative of all. This representative then has the authority and responsibility to freely negotiate agreements fixing the terms and conditions of employment for all employees, regardless of their position in the union and even regardless of whether they are members of the union at all (*Steele* v. *L. & N. R. Co.*, 323 U.S. 192 (1944)). In the rail industry, many of those represented have, in fact, been members of rival unions. Congress was, of course, aware of the scope of the authority thus conferred on collective bargaining representatives but concluded that the national interest in stable labor relations and the employees' interest in obtaining a voice in determining the conditions of their employment could be preserved only if the unions were afforded equality of bargaining power by being able to present a united front in negotiations (*Weyand, Majority Rule In Collective Bargaining*, 45 Colum. L. Rev. 556 (1945)). Thus, the mere fact that mergers may lessen the influence of particular groups within bargaining units does not justify a departure from the traditional balance which Congress and this Court have established between individual and collective rights in labor relations.

The balance which has been struck by this Court is reflected by *Steele* v. *L. & N. R. Co.*, 323 U.S. 192 (1944) and *Vaca* v. *Sipes*, 386 U.S. 171 (1967). The *Steele* case out-

lined the sole limitation which has been placed on the union's right to freely negotiate terms and conditions of employment for all whom it represents (323 U.S. at 202-03):

> "We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them. This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented."

Thus, this Court concluded that the only appropriate restraint on the power of the collective bargaining representative to create and restrict the rights of the employees it represents was its duty to refrain from hostile discrimination against any individuals or groups.

Subsequently, this Court applied this principle in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953) and *Humphrey* v. *Moore*, 375 U.S. 335 (1964). In *Ford*, this Court upheld the validity of a "supplementary agreement" which reduced the seniority rights held by certain employees under a previous agreement, stating (345 U.S. at 338):

> "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. Compromises on a temporary basis, with a view to long-range advantages, are natural incidents of negotiation."

In *Humphrey*, this Court upheld the union's action in agreeing to the dovetailing of the seniority rosters of two

motor carriers after they had exchanged certain operating rights. This Court stated (375 U.S. at 349-50):

> ". . . we are not ready to find a breach of the collective bargaining agents' duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents. . . ."

These cases concerned the collective bargaining representatives' right to enter into new agreements. In *Vaca* v. *Sipes,* this Court dealt with the other major area of concern in labor relations, the union's right to bind the employees it represents by its action in handling their grievances. This Court held that an employee was bound by his union's good faith determination that his grievance was without merit and its consequent failure to exhaust a contractually-created arbitration procedure within its exclusive control, even though the employee subsequently convinced a court and jury that his contractual rights had actually been violated. This Court reasoned (386 U.S. at 191-93):

> "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration."
>
> • • •
>
> ". . . if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial."

This Court has thus held that the rights of individual members of a bargaining unit are properly protected from potential abuse by their collective bargaining representative, either in negotiating agreements or resolving grievances, by providing a judicial remedy where the individual can show that union action was taken in bad faith.

This Court has concluded that additional limitations on the authority of the collective bargaining representative would unduly sacrifice the collective rights of the majority and the interests of employers and the public in stable labor relations to the long-range detriment of all parties concerned. The present case provides no reason for departing from these principles. Although respondents' complaints arise out of a railroad merger, the union authority which respondents question is that inherent in the status of the union as the exclusive representative of the entire craft or class. There is no basis for assuming that Congress intended to alter that union authority in merger situations.

III. SECTION 5(2)(f) OF THE INTERSTATE COMMERCE ACT DOES NOT REQUIRE OR PERMIT THE JUDICIAL INTERVENTION IN THE COLLECTIVE BARGAINING PROCESS SOUGHT BY RESPONDENTS.

A. The Literal Language of Section 5(2)(f)

Respondents argue that the Court should interpret Section 5(2)(f) to require that "third sentence agreements comply with the minimum protective standards of the first and second sentences . . . under pain of Commission disapproval of any agreement which falls short of the statutory minimum." (Respondents' Brief, p. 46). This would require the Commission to examine voluntary agreements to determine whether they provide the "fair and equitable arrangement" referred to in the first sentence and at least

the protective benefits described in the second sentence of 5(2)(f). Should the Commission find that these requirements are met, it would be required to order the carrier to comply with the terms of the agreement at the time it approves the merger. Should the Commission conclude that the agreement does not meet these standards, it would be required to substitute its judgment of fair and equitable protective provisions for the results of the collective bargaining process by rejecting the agreement and prescribing different employee protection. Similarly, respondents argue that third sentence agreements made subsequent to the consummation of a merger are invalid if a court retroactively determines that they "abrogate" any rights created by prior agreements or orders (Respondents' Brief, pp. 68-69).

This position finds no support at all in the literal langauge of Section 5(2)(f). If the third sentence of Section 5(2)(f) were removed from that section entirely, no one would suggest that labor and management could not subsequently sign and submit to the Commission a stipulation stating their mutual position as to the protective conditions which the Commission should prescribe. Nor would anyone suggest that labor and management could not, after the merger, enter into agreements which did not abrogate rights created by the order of approval. Respondents' interpretation of Section 5(2)(f), however, would restrict the authority of labor and management with regard to employee protection to the negotiation of stipulations and agreements of this nature and would thus render the last sentence of Section 5(2)(f) absolutely meaningless.

The last sentence of Section 5(2)(f) provides that the parties may enter into agreements relating to employee protection "notwithstanding any other provision of this Act". The only possible reason for inclusion of the quoted phrase

was to insure that nothing in the Act would be construed to limit the right to make such agreements and to require such conflicts, if they arose, to be resolved in favor of the parties' right to agree. The only language in the Interstate Commerce Act which relates in any way to employee protection is the language of Section 5(2)(f) itself and, thus, the only possible source of restrictions on the parties' right to agree on employee protection are the first two sentences of that section. It must be concluded, therefore, that the "notwithstanding" clause of Section 5(2)(f) vitiates any restrictions on the collective bargaining process which might otherwise be inferred from the first two sentences of that section relating to the Commission's authority to prescribe protection. Respondents' position is thus clearly refuted by the literal language of Section 5(2)(f).

B. The Legislative History of Section 5(2)(f)

Respondents argue that N & W's position is contrary to the legislative history of Section 5(2)(f) but fail to cite a single supporting word of legislative history in this connection. Instead, respondents rely on this Court's decisions in *Railway Labor Executives' Assoc.* v. *United States,* 339 U.S. 142 (1950), and *Brotherhood of Maintenance of Way Employes* v. *United States,* 336 U.S. 169 (1961). In both cases, the sole question considered by this Court was the extent of the Commission authority to prescribe protective conditions where the parties had *not* entered into voluntary agreements. Neither decision mentions the third sentence of Section 5(2)(f).

Apparently, respondents consider these decisions relevant because they establish (Respondents' Brief, p. 52):

> ". . . that one of the principal purposes of Section 5(2)(f) 'was to provide mandatory protection for the interests of employees affected by railroad consolida-

> tions,' and that the Commission is 'required to observe the provisions of the second sentence of Section 5(2)(f) as a minimum protection for employees adversely affected'."

Respondents argue that N & W's position is inconsistent with this view of the purpose of the first two sentences of Section 5(2)(f). Respondents assert that under the N & W's interpretation "the railroad and union would [in cases where protective agreements are sought] start from a position which presupposed no obligation to meet any mandatory minimum level of protection" and that N & W's view requires a conclusion that railway labor intended, by the last sentence of Section 5(2)(f), "to weaken its own bargaining position in cases where agreement on protective conditions was sought" (Respondents' Brief, p. 53).

The cases cited by respondents establish that Congress intended, by the first two sentences of Section 5(2)(f), to guarantee that employees were protected in railway consolidations and to require the Commission to prescribe at least certain minimum protection in instances where it had authority to determine what that protection would be. These propositions are in no way inconsistent with N & W's view of the meaning of the last sentence of Section 5(2)(f).

Under N & W's interpretation of Section 5(2)(f), railway labor is guaranteed at least the minimum benefits of Section 5(2)(f) if it is unable, by voluntary agreement, to obtain protection more satisfactory to it. All that labor's representatives are required to do is refuse to enter into such an agreement and the Commission is then required to prescribe at least the protection described in the second sentence of Section 5(2)(f). For this reason, removing the restrictions of the first two sentences in instances in which protective agreements are voluntarily entered into in no way weakens labor's bargaining position. In negotiations

for a voluntary protective agreement, representatives of labor start out with the alternative of Commission-prescribed protection and seek to obtain something preferable through voluntary agreement. It is respondents' interpretation of Section 5(2)(f) which is inconsistent with organized labor's role in drafting that provision. Respondents' view suggests that organized labor, having assured itself of obtaining certain minimum benefits in instances in which management refused to enter into an agreement, also intended to limit its own authority to agree upon other conditions and to subject voluntary agreements to possible invalidation by the Commission which, under respondents' interpretation, would have authority to reduce as well as increase agreed-upon protection.

C. The Administrative Interpretation of Section 5(2)(f)

Respondents also dispute the Interstate Commerce Commission's own representations as to what its interpretation of Section 5(2)(f) is and has been. In so doing, respondents place principal reliance on the Commission decision in *Florida East Coast Ry. Reorganization,* 307 I.C.C. 5 (1958), arguing that this case demonstrates that the Commission "has consistently reviewed pre-merger agreements". The *Florida East Coast Ry.* case, however, involved the Commission's jurisdiction to reorganize a bankrupt railroad under Sec. 205(d) of the Bankruptcy Act (11 USC Sec. 205(d)). The Commission did reject a stipulation of the parties to the bankruptcy proceeding as to provisions for the protection of the bankrupt carrier's employees after the reorganization plan was carried out. It found that the stipulation provided more protection than could be justified under the circumstances and prescribed *reduced* protective benefits in its order approving the reorganization plan. Subsequently, the Railway Labor Execu-

tive Association (RLEA), which at the time represented the vast majority of employees in the railroad industry, petitioned for reconsideration of the Commission's action on the theory that the stipulation constituted an agreement made pursuant to the last sentence of Section 5(2)(f) and that, consequently, the Commission had no authority to review it. The Commission considered and rejected the RLEA's petition in a supplemental opinion reported at 312 I.C.C. 744. It held that its authority under the Bankruptcy Act was broader than that afforded by Section 5 and that, in any event, the stipulation was not an agreement within the contemplation of Section 5(2)(f).

The Commission decision rejecting RLEA's petition was affirmed on the same ground (*In Re Florida East Coast Railway Company*, 171 F. Supp. 512 (S.D. Fla. 1957)). Thus, the only significance the *Florida East Coast Ry.* case has to the present proceeding is that it demonstrates that an association representing the vast majority of railway employees took a position as to the meaning of Section 5(2)(f) identical with N & W's position in this case.

Respondents also quote a paragraph from the Commission's amicus brief in *Clemens* v. *Central R. R. Co. of New Jersey*, 264 F. Supp. 551 (E.D. Pa. 1967), reversed 339 F.2d 825 (3rd Cir. 1968), and argue that the paragraph is inconsistent with the Commission's representations concerning its interpretation of Section 5(2)(f). Respondents, however, fail to quote the immediately following paragraph of that brief which states (A. (I) 175):

> "In more recent cases the Commission has held that, 'as to employees covered by the aforementioned agreements, no conditions to our order are necessary'; and prescribed a set of conditions only for those 'not protected by the foregoing stipulations and agreements.' *Norfolk & W. Ry. Co. Merger*, 307 I.C.C. 401, 439 (1959). Or upon noting that a particular union-carrier

> stipulation was 'of the character contemplated by section 5(2)(f) of the act for the protection of railroad employees who may be adversely affected by the authorized transaction,' the Commission has simply held, 'as to the employees covered by the stipulation, no conditions in our orders are necessary,' and prescribed conditions only to protect 'employees of the applicants [railroads] not covered by the aforesaid stipulation.' *Chicago & N.W. Ry. Co. Purchase,* 312 I.C.C. 285, 296 (1960); and see *Duluth, S.S. & A.R. Co. Merger,* 312 I.C.C. 341, 356 (1960). Thus, even when protective conditions are stipulated during the course of the proceeding, the employees covered by such agreement must claim their benefits under and pursuant to such agreement, and not under or pursuant to the Commission order."

It should further be noted that in that brief the Commission also expressed the view that even in situations where no voluntary agreement is reached prior to a merger and the Commission orders protection, the parties have full authority to change that protection by subsequent agreement (A. (I) 174).

D. The *North Western* case and Section 5(2)(f)

In urging their interpretation of Section 5(2)(f), respondents devote seven pages of their brief to the decision in *Chicago and North Western Ry. Co.* v. *Brotherhood of Locomotive Engineers,* 202 F. Supp. 277 (S.D. Ia. 1962), Aff. 314 F.2d 424 (8th Cir. 1963). Respondents begin this discussion by misrepresenting the North Western's position in that case and arguing that the N & W's position here is inconsistent with the position they erroneously attribute to the North Western.

Respondents state that the *North Western* case demonstrates that (Respondents' Brief, p. 60):

> "Railroad management . . . has not hesitated to urge

upon the courts the conclusion that the commission's duty is to include third sentence 5(2)(f) agreements in its order, so that a union refusal to comply with that agreement can be enjoined as a violation of the Commission's order rather than be dealt with as a dispute under the Railway Labor Act."

The carrier in the *North Western* case, however, did not argue that it was the Commission's duty to include third sentence agreements in its order, was not attempting to enforce either an order or an agreement, and did not seek an injunction.

The *North Western* case arose out of the merger of the North Western with the Minneapolis and St. Louis Railroad. Prior to the merger, the North Western had entered into an agreement concerning employee protection which provided an administrative procedure to adjust employee rights in the event of a post-merger consolidation of facilities. After the Commission approved the merger, the North Western sought to invoke this procedure, but the union refused to participate on the ground that such a consolidation would require changes in employee seniority rights created by other agreements and that Section 6 of the Railway Labor Act provided the only method by which such changes could be accomplished.

North Western then filed an action seeking a declaratory judgment. The North Western argument, adopted by the Court, was that Section 5(11) of the Interstate Commerce Act relieved the parties of the restrictions of other laws in accomplishing a merger approved by the Commission and, consequently, the procedures of the agreement prevailed over any contrary provision of the Railway Labor Act. Whether the Commission had ordered the parties to comply with the provisions of the agreement was irrelevant to the resolution of this issue. The significant fact was that the

Commission had approved the merger plan, and the protective agreement was part of that plan. Thus, under the literal language of Section 5(11), the requirements of the Railway Labor Act could not be imposed to prevent the accomplishment of the merger in accordance with the approved plan.

N & W's position is obviously not inconsistent with the position of the North Western or the Court's holding in the *North Western* case since N & W is not arguing here that the provisions of the Railway Labor Act should be applied to prevent the accomplishment of an authorized merger. N & W seeks here only a holding which would make the protective agreements it has entered into with respondents, including the provision of those agreements creating a procedure for resolving disputes concerning their meaning, binding upon the parties. In doing so, N & W is not asserting rights based on other federal laws but, instead, asserting its right, under Section 5(2)(f) of the Interstate Commerce Act, to enter into voluntary agreements.

N & W's only reliance on the Railway Labor Act is its assertion that, should this Court consider the arbitration provision of the agreement inappropriate for any reason, the parties would then be remitted to the exclusive jurisdiction of the National Railroad Adjustment Board for the resolution of this dispute. This argument is in no way inconsistent with Section 5(11) since the Railway Labor Act would not be applied to prevent the accomplishment of a Commission-authorized transaction but simply to interpret an agreement.

It is also clear that the question of the applicability of Section 6 procedures to the negotiation of protective agreements is not involved in this case. To the extent that the application of Section 6 of the Railway Labor Act would

be inconsistent within the congressional purpose to permit the carrying out of railway mergers approved by the Commission, those procedures would be rendered inapplicable by Section 5(11), regardless of whether or not the Commission prescribes protective conditions in its order.

E. The Third Sentence of Section 5(2)(f) As An Independent Source Of Judicial Jurisdiction

Respondents' final argument with regard to the Interstate Commerce Act is that even if the Court holds that the first two sentences of Section 5(2)(f) do not limit the right to agree, preserved by the third sentence, federal jurisdiction of this action is still sustainable on the theory that Implementing Agreement 1-A violates the third sentence of Section 5(2)(f). Respondents' argument that Implementing Agreement 1-A violates the third sentence of Section 5(2)(f) is based on the contention that the agreement does not pertain to employee protection because it would provide lower benefit payments than would be payable under the 1962 Agreement, as interpreted by respondents.

This argument is patently frivolous. It is difficult to understand how an agreement which fixes a formula for calculating the protective benefits payable to employees can be said not to pertain to employee protection. Even if such an argument could be made it is dependent on the conclusion that the 1962 Agreement means what respondents say it means. Absent a determination that the Commission ordered the parties to obey the terms of the 1962 Agreement, however, the federal courts clearly would be without jurisdiction to resolve this preliminary question.

In any event, an action for violation of the third sentence of Section 5(2)(f) could be justified only by concluding that that sentence prohibits agreements which do not fall within its scope. Thus, in order to accept respondents' contention,

the Court would be required to hold that labor and management cannot make agreements which do not pertain to employee protection. Such a suggestion is obviously incorrect. Under the Railway Labor Act, labor and management may agree on any subject affecting the terms and conditions of employment in the railroad industry, including employee protection. The only limitation on this right is the duty of the union to refrain from engaging in hostile discrimination against any of the represented class. Even a perfunctory glance at the language and history of the third sentence of Section 5(2)(f) demonstrates that it was not intended to either expand or limit this right, but only to prevent other provisions of the Interstate Commerce Act from imposing limitations upon it. That sentence cannot be the basis of an action to invalidate a collective bargaining agreement since its language does not prohibit agreements of any kind.

IV. THE COMMISSION'S ORDER APPROVING THE PURCHASE OF THE SANDUSKY LINE DOES NOT SUPPORT THE LOWER COURTS' ASSUMPTION OF JURISDICTION IN THIS CASE.

Respondents' brief gives only perfunctory attention to the theory, which they successfully urged upon the lower courts, that the Interstate Commerce Commission ordered the parties to the 1962 Agreement to obey its terms and that this action was consequently one to enforce a Commission order. The reason for respondents' reluctance to press this argument is obvious. The Commission expressly stated that it was not imposing protective conditions for the benefit of employees covered by the agreement (324 I.C.C. at 89-90) and spoke only of making the authorization of its order "subject to the agreement" (324 I.C.C. at 50). When it discussed protective provisions for the employees not covered by the 1962 Agreement, however, it concluded that entirely

different conditions, providing substantially less protection, would be fair and equitable and stated that those conditions "would be imposed . . . in our order" (324 I.C.C. at 50). The difference between imposing conditions in an order and making the authorization contained in an order subject to an agreement are obvious and fundamental. When conditions are imposed by an order, a positive duty to fulfill the conditions is created by the order itself. When, however, authorizations are made "subject" to an existing agreement, the purpose is to prevent the authorization from being interposed to change or nullify the provisions of the agreement. The source of any positive rights relating to the subject matter of the agreement in such a situation, however, is the agreement and not the order which is subject to it. The recital that the order is subject to the agreement does not add to or detract from the rights and obligations thus created by the agreement.

Respondents now place principal reliance on the contention that this Court should hold that the 1962 Agreement may be enforced in federal court because it became part of the Commission order as a matter of law even if the Commission actually failed to include it. This argument is obviously an indirect way of urging the Court to simultaneously overturn the Commission's order approving the merger, substitute a new order which the Court feels would be in accord with statutory requirements, and enforce this new order.

This argument overlooks the fact that this action is not a statutory review proceeding, but instead an action seeking enforcement of a Commission order. A Commission order may be set aside only under the procedures outlined in Sections 2321-2325 of the Judicial Code (28 U.S.C. Sections 2321-2325). Such a proceeding must be instituted by a complaint naming the United States as the defendant.

and must be heard by a three judge court.* Since these procedures were not followed in this case, it is obvious that the courts below did not have authority to determine whether the Commission's order complied with the requirements of the Interstate Commerce Act. Moreover, even if the courts below could have considered this question, they could not, upon determining that the order did not comply with the Act, alter that order to conform with their view of the statutory requirements. A holding that the first two sentences of Section 5(2)(f) place limitations on the parties' right to agree on employee protection and that, therefore, the Commission has authority to review and alter voluntary agreements, could only be based on a conclusion that Congress wished the employees to have protection which the Commission determined to be fair and equitable under all the circumstances. Respondents' contentions that the courts should enforce employee protective agreements entered into by the parties in situations where the Commission has failed to exercise its authority in this regard would be inconsistent with such a scheme. Thus, even in a proper review proceeding, a court that determined that

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* Respondents argue that the Court should create a remedy for them out of whole cloth because "cases to review an Interstate Commerce Commission Order . . . must be filed within 90 days after the date the Commission's order becomes final, 28 U.S.C. Section 1336", and in this case "they [were] led to believe for more than 90 days after the Commission's order that they [were] to be fairly and adequately treated." (Respondents' brief, pp. 69-70). The 90 day limitation created by Section 1336, however, applies only to actions to review Commission orders resolving issues referred to the Commission by courts. There is no statute limiting the time for filing an action to set aside an order entered by the Commission in a proceeding, such as the N & W merger proceeding, which was originally initiated before the Commission. The doctrine of laches applies in such cases and would not bar an action which was delayed through no fault of respondents.

the Commission had failed to exercise its statutory authority with regard to employee protection could only remand the proceeding in order to give the Commission an opportunity to exercise its statutory authority. Upon such a remand, the Commission might determine that it could appropriately prescribe the terms of the 1962 Agreement, but it also might determine that either greater or lesser protection was fair and equitable and reject the 1962 Agreement in favor of some other protective plan.

CONCLUSION

For the reasons discussed in the Brief For Petitioner and in this Reply Brief, the decision of the Sixth Circuit Court of Appeals should be reversed and remanded with directions to dismiss for lack of jurisdiction and for failure to exhaust administrative remedies.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-97

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

RICHARD NEMITZ, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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Petitioner, Norfolk and Western Railway Company, respectfully prays that the Court grant a rehearing of the above-entitled cause. Rehearing is urgently required to permit a majority of a fully-constituted Court to consider and resolve the important issues raised by this case. Rehearing is also required to provide a resolution of the issue concerning the necessity of exhausting the arbitration provisions contained in a collective bargaining agreement. Although certiorari was granted with respect to this issue, the Court's opinion fails to discuss or resolve this important question. Moreover, this Court's interpretation of Section 5(2)(f) of the Interstate Commerce Act clearly

requires review of the pre-merger agreement by the Interstate Commerce Commission and a determination as to whether the protection thus provided is fair and equitable under all circumstances. Since it is clear that the Commission did not perform that task in this case, disposition of this litigation in accordance with the present opinion of the Court requires supplementary proceedings before that agency rather than a continuation of the present enforcement action.

I. REHEARING SHOULD BE GRANTED TO PERMIT A MAJORITY OF A FULLY-CONSTITUTED COURT TO RESOLVE THE IMPORTANT ISSUES RAISED BY THIS CASE.

This case raises important and crucial issues concerning the scope of the Interstate Commerce Commission's obligations under Section 5(2)(f) of the Interstate Commerce Act and the effect of a Commission order approving a rail consolidation upon prior and subsequent collective bargaining agreements. As the United States and the Interstate Commerce Commission stated in their amicus brief filed in this Court, the Commission has proceeded on the basis of a particular interpretation of the Statute "ever since the enactment of Section 5(2)(f) in 1940" (Amicus Brief, p. 28). It is this administrative interpretation, established and followed for more than 30 years, that the majority opinion finds to be inappropriate and contrary to the provisions of the Interstate Commerce Act. Since this statutory provision is central to the Commission's role in railroad consolidation proceedings and impinges on a multitude of collective bargaining agreements involving such consolidations, destruction of the established interpretation entails a potential for developments of a most disruptive and pervasive character. We respectfully suggest that such a decision

should not be made by less than a majority of a fully-constituted Court.

In the present case, a rehearing would permit a fully-constituted Court to participate in the decision and would thus eliminate the uncertainty inherent in a 4 to 3 decision with two vacancies in the process of being filled. The Court has frequently recognized the undesirability of deciding a case by a vote of less than a majority of a full Court and has sought to avoid such a result. The recent removal of certain cases from the calendar, to permit later consideration by a fully-constituted Court, illustrates this approach.

In the past, the Court has frequently used the rehearing process where a lower court decision has been affirmed by a 4 to 4 vote and where it appeared likely that upon reargument a majority decision would ensue. *United States* v. *One 1936 Model Ford V-8,* 305 U.S. 564, 666; *Toucey* v. *New York Life Ins. Co.,* 313 U.S. 538, 596; *Commercial Molasses Corp.* v. *New York Tank Barge Corp.,* 313 U.S. 541, 596; *Baltimore & Ohio R. Co.* v. *Kepner,* 313 U.S. 542, 597; *New York, C. & St. L. R. Co.* v. *Frank,* 313 U.S. 538, 596; *Bruces Juices, Inc.* v. *American Can Co.,* 327 U.S. 758, 812; *MacGregor* v. *Westinghouse Co.,* 327 U.S. 758, 812. This has been particularly true when a newly-appointed Justice became available to make a majority decision possible. *Indian Towing Co.* v. *United States,* 349 U.S. 902, 926; *Ryan Co.* v. *Pan-Atlantic Corp.,* 349 U.S. 901, 926; *Gray* v. *Powell,* 312 U.S. 666, 313 U.S. 596; *Halliburton Co.* v. *Walker,* 326 U.S. 696, 327 U.S. 812.

The uncertainty arising from a 4 to 4 affirmance is no greater than the uncertainty which arises from a 4 to 3 decision reached by the Court shortly before two vacancies are filled. In both cases, the continued validity of the decision is dependent on the unknown views of the new Justices. The tenuous nature of a 4 to 3 decision in such a situation

is demonstrated by *Hust* v. *Moore-McCormack Line,* 328 U.S. 707 (1946), decided by a 4 to 3 vote at a time when two vacancies existed on the Court. Although a rehearing was denied (329 U.S. 674), subsequently, in *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U.S. 783 (1949), two new Justices joined with the three original dissenters to overrule *Hust.* The four Justices who comprised the "majority" in the original case dissented. Clearly, such a result should be avoided where possible and can be avoided in this case by granting a rehearing.

In the present case, a decision by less than a majority of a full Court is particularly undesirable because it may result in a substantial amount of unnecessary and avoidable litigation and industrial strife. Many pre-merger employee protective agreements have been negotiated and are currently in effect. In the typical situation, the protection provided by these agreements is stated in broad and general terms, to be implemented by later agreements as post-merger problems arise. Numerous implementing agreements are consequently negotiated on an ad hoc basis after consummation of the merger. Even in those instances in which there is no pre-merger agreement, it is customary to enter into subsequent agreements to resolve the many post-merger problems which arise. All of these agreements have been reached through the traditional give and take of the collective bargaining process, premised on the normal authority of the collective bargaining representative to bind all members of the represented class or craft. The decision in this case, however, invites individual employees, not entirely satisfied with the terms agreed upon by their representatives, to seek to overturn such agreements.

It must be emphasized that controversies of this kind affect the complaining individuals, the carrier, the directly-involved collective bargaining representative, as well as other unions which may have signed the same or identical agreements. Moreover, invalidation of a post-merger agree-

ment may adversely affect a large number of employees who do not share the views of the complaining individuals. Because of their nature and broad ramifications, these controversies may very well result in extensive litigation and industrial strife. Results of this kind, we submit, should not be occasioned by a decision of this Court on a 4 to 3 basis when a rehearing would permit examination of the issues and a decision by a majority of a fully-constituted Court.

Moreover, this Court's resolution of the issues presented by this case will have a most immediate and controlling effect on many irreversible decisions with important consequences for the indefinite future. The desirability of future transactions requiring Commission approval under Section 5(2) and the content of prospective collective bargaining agreements will be most directly influenced. Under these circumstances, a consistent and enduring interpretation of the applicable law is required. This objective can be furthered by granting a rehearing in this case.

II. THE OPINION OF THE COURT FAILS TO DISCUSS OR RESOLVE ONE OF THE TWO ISSUES ON WHICH CERTIORARI WAS GRANTED.

One of the questions as to which the Petition for Certiorari was granted concerned the necessity of exhausting the arbitration provision contained in the pre-merger agreement. The Court's decision that the pre-merger agreement must be a part of the Commission's order approving the merger does not resolve this question since, under this theory, the Commission's order must also include the arbitration provision of the agreement. Thus, it must be assumed that the Commission decided that the "fair and equitable" means for resolving disputes over the interpretation of its order was through the arbitration process contained in that order. In the present case, the District Court resolved a dispute

over the interpretation of the order although the arbitration process had not been exhausted. The Norfolk and Western moved to dismiss the complaint on this ground, and this defense was rejected by the District Court (A. (I) 33-35). The same issue was raised, argued and decided in the Court of Appeals (A. (II) 192). The propriety of the Court of Appeals' decision on this point was one of the two questions presented by the Petition for Certiorari (Pet., pp. 22-30). It was briefed by both petitioner (Brief, pp. 53-62) and respondents (Brief, pp. 87-98). The Court's opinion, however, fails to mention this issue. The courts below held that respondents were not bound by the arbitration provision even though the failure to exhaust arbitration was the result of a good faith determination by respondents' collective bargaining representative that respondents claim was without merit. This holding is contrary to this Court's decision on the same issue in *Vaca* v. *Sipes,* 386 U.S. 171 (1967), and in conflict with the decision of the 8th Circuit in *Bonnot* v. *Congress of Independent Unions, Local No 14,* 331 F.2d 355 (8th Cir. 1964), as the court below acknowledged (A. (II) 191). The present decision leaves this conflict unresolved.

The Court's decision that pre-merger agreements are converted into Commission orders by approval of the merger and are thus enforceable in federal court makes it vitally important to determine the efficacy of arbitration provisions. Arbitration clauses have been a standard feature of the many pre-merger agreements entered into since 1940. In the absence of pre-merger agreements, the Commission has uniformly prescribed protective conditions which contain arbitration clauses. Thus, in every future case seeking enforcement of a Commission order for the protection of employees, questions will inevitably arise as to the necessity of exhausting the prescribed arbitration procedure. This important issue is presented by this case and should be resolved by the Court.

III. THE MAJORITY OPINION DOES NOT DEAL ADEQUATELY WITH THE ISSUES PRESENTED BY THIS CASE.

Although we do not intend to reargue the merits of the case in this petition, we wish to comment briefly on portions of the majority opinion which reflect a failure to deal with the questions presented by this case.

In its discussion of the pre-merger agreement, the Court states that "By its terms, petitioner agreed to employ all employees of the lines involved *with the guarantee that they will not be adversely affected in their employment . . .*" (Slip Opinion, p. 1). The Court goes on to state that "Some 96 Sandusky Line employees elected to accept employment with petitioner on the terms and conditions stated" (Slip Opinion, p. 2). The Court's quotation, however, is not from the portion of the agreement applicable to the Sandusky Line but from the Examiner's general characterization of the entire agreement in his recommended report and order to the Interstate Commerce Commission. Obviously, the Pennsylvania Railroad employees who elected employment with the N & W on the Sandusky Line did not do so in reliance on the Examiner's report. What these employees did rely on is the language of Section 3 of the pre-merger agreement.* This section of the agreement, as respondents

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* The form distributed to employees to record their election to remain with the Pennsylvania or to become N & W employees included a verbatim reproduction of Section 3 of the 1962 agreement (A. (I) 153-59). That section provides that:

> "None of such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment except that Norfolk & Western shall not be required to provide employment to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition." (A. (I) 67).

have admitted, was designed to meet the specific circumstances of the Sandusky Line employees and to encourage a proper allocation of employees to meet the needs of the Pennsylvania on the Toledo Division and the requirements of the N & W on the Sandusky Line. Other employees of "the lines involved" (the Wabash and Nickel Plate railroads) were covered by Sections 1 and 2 of the agreement. Obviously, the Examiner's single sentence characterization of the protection afforded by the agreement could not possibly describe, with any degree of accuracy, the specially-designed protection afforded to the Sandusky Line employees under Section 3 of the agreement as contrasted with the protection afforded the vast majority of involved employees under Sections 1 and 2. To regard this general description as a definitive statement of the protection applicable to respondents is unwarranted.

The Court states that (Slip Opinion, p. 5):

> "When there is a collective agreement and the Commission, as here, adopts or approves it, the 'notwithstanding' sentence of Sec. 5(2)(f) is not, as suggested, read out of the Act."

It is difficult to understand the assumption that the Commission in this case adopted or approved the 1962 agreement in view of that agency's explicit statement that it did not do so (Amicus Brief, p. 30) and that this has been its consistent practice for the past thirty years (Amicus Brief, pp. 27-30). Moreover, the Court does not comment on the efficacy of the last sentence of Section 5(2)(f) in the situation where there is a collective agreement but the Commission, rejecting the terms agreed upon by the parties, decides to prescribe other and different protection. This is the result which the last sentence of Section 5(2)(f) was intended to prevent and which the Court's decision now authorizes despite this sentence.

The Court's view that "the significance of the last sentence is that it provides machinery for the terms of a pre-merger collective agreement" (Slip Opinion, p. 5) ignores the fact that the machinery for reaching collective agreements is contained in the Railway Labor Act. The provisions of that Act were utilized prior to the passage of Section 5(2)(f) in negotiating the Washington Job Protection Agreement of 1936 which fixed protective benefits for railway workers affected by railway mergers. The last sentence of Section 5(2)(f) was not necessary to, and did not, create the machinery for an agreement, but was enacted to prevent the Commission from interfering with an agreement resulting from the procedures of the Railway Labor Act.

The Court dismisses the conclusion of respondents' collective bargaining representative, the Brotherhood of Railroad Trainmen, that the 1965 agreement did not abrogate rights created by the pre-merger agreement as being based "on a mistaken view of the law" (Slip Opinion, p. 7). The union's position, however, was not based on any view of the law, but simply on its recognition that the pre-merger agreement which it negotiated with the N & W was not intended to provide the benefits which respondents sought. Had the union realized that a Court might subsequently interpret the agreement without regard to the intention of the parties and substitute different criteria of appropriate protection, it might have refused to honor its agreement with the N & W. This circumstance does not alter the fact that the union, in good faith, interpreted the agreement which it had negotiated as not providing the benefits respondents sought. It does, however, demonstrate the serious adverse effect which the Court's decision will have on stability of labor relations.

IV. THIS CASE SHOULD BE DISMISSED WITHOUT PREJUDICE TO THE INITIATION BY RESPONDENTS OF SUPPLEMENTARY PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION.

The basic conclusion reached by the majority in this case is that Section 5(2)(f) requires the Commission to review pre-merger agreements and to determine whether the protection thus provided is fair and equitable under all the circumstances. This conclusion must be predicated on the view that Congress intended that the carriers provide and the employees receive only that protection which the Commission affirmatively decides to prescribe after such a review. It is abundantly clear that the Commission did not perform that function in this case. The United States and the Commission have expressly represented to this Court that "the Commission did not review the agreement in this case under Section 5(2)(f), and . . . it had no responsibility to do so" (Amicus Brief, p. 12). Reverting to this matter, the United States and the Commission state:

> "In the instant case, the Commission's statement that no conditions were necessary, 324 I.C.C. at 50, 106, meant only that its duty to protect employees under Section 5(2)(f) had been satisfied by the 1962 agreement. *The Commission did not review that agreement in light of Section 5(2)(f)* and did not adopt it." (Amicus Brief, p. 30, emphasis added)

The Court's judgment, authorizing enforcement of a pre-merger agreement which has not been reviewed by the Commission, is thus clearly inconsistent with the Court's view of the statutory allocation of responsibility for employee protection. In the circumstances of this case, the Court's statutory interpretation requires dismissal of the respondents' enforcement action, without prejudice to the initiation of supplementary proceedings before the Commission under Section 5(9) of the Act to obtain the Commission review found to be required and an administrative order prescribing protection in light of that review.

Conclusion

For the foregoing reasons, this Petition for Rehearing should be granted.

Respectfully submitted,

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December, 1971

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

.....
Counsel for Petitioner

Syllabus

NORFOLK & WESTERN RAILROAD CO. v. NEMITZ ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 70-97. Argued October 21, 1971—Decided November 15, 1971

In anticipation of a railroad consolidation by which petitioner acquired the so-called Sandusky Line from the Pennsylvania Railroad, petitioner entered into an agreement with certain labor unions for the protection of the employees involved. The agreement provided that the employees would not be adversely affected in their employment as a result of the transaction. Respondents were employees of the Pennsylvania, who worked seasonally on the Sandusky Line, and during the winter freeze which barred navigation on Lake Erie worked at other points on the Pennsylvania system. Upon the consolidation, respondents accepted employment with petitioner. The agreement called for a salary supplement based upon pre-consolidation monthly compensation. The Interstate Commerce Commission (ICC) in its consolidation approval stated that the agreement was "made pursuant to and in conformity with § 5 (2) (f) of the Interstate Commerce Act for the protection of the covered employees." Section 5 (2) (f) provides that the ICC "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected," and states that "[n]otwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into" by any railroad and an employee union. A post-consolidation agreement was made between petitioner and the union, under which petitioner claimed that the salary supplement was limited solely to the amount paid respondents for their seasonal Sandusky Line work. The District Court agreed with respondents that the new agreement was not enforceable as it conflicted with the terms of the pre-merger agreement and thus violated the Act under which the consolidation took place, and the Court of Appeals affirmed, with a modification as to damages. *Held:*

1. Section 5 (2) (f) provides mandatory compensation protection for railroad employees affected by a consolidation, and the

ICC's adoption or approval of a pre-merger collective agreement becomes a "condition" of the ICC's approval of a consolidation under that section. Pp. 41–43.

2. The "notwithstanding" proviso of § 5 (2)(f) affords the machinery for the terms of a pre-merger collective agreement and thus supplies one minimum measure of fairness required by the section. P. 43.

3. The post-consolidation agreement abrogated the employees' rights and the standard of "compensation" covered by the pre-merger agreement that had come under the ICC's protective order. Pp. 43–45.

436 F. 2d 841, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, and MARSHALL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE, J., joined, *post*, p. 45.

Martin M. Lucente argued the cause for petitioner. With him on the briefs were *Howard J. Trienens* and *John M. Curphey*.

Thomas J. Murray, Jr., argued the cause and filed a brief for respondents.

Solicitor General Griswold, Fritz R. Kahn, and *Leonard S. Goodman* filed a brief for the United States et al. as *amici curiae* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In connection with a 1964 consolidation by which petitioner railway company absorbed New York, Chicago & St. Louis R. Co. (Nickel Plate), the so-called Sandusky Line, running from Columbus, Ohio, to Sandusky, Ohio, was acquired from the Pennsylvania Railroad system. Respondents were at the time employees of the Pennsylvania on the Sandusky Line. Their work was seasonal because the winter freeze barred navigation on Lake Erie. During those periods junior employees of Sandusky

worked at other points on the Pennsylvania's Toledo Division.

In anticipation of the 1964 consolidation, petitioner entered into an agreement with 19 labor organizations for protection of the employees of the several railroads coming into the consolidation, including those on the Sandusky Line. Petitioner agreed to employ "all employees of the lines involved *with the guarantee that they will not be adversely affected in their employment* as a result of the proposed transactions or for any reason other than furloughs due to seasonal requirements or a decline in volume of traffic or revenue. 324 I. C. C. 1, 89 (emphasis added).

Each employee was to receive a monthly supplement to his post-consolidation monthly earnings equal to the excess, if any, of his average monthly compensation for the 12 months prior to the consolidation in which he had performed services.

Some 96 Sandusky Line employees elected to accept employment with petitioner on the terms and conditions stated. Twenty-five were junior men who had worked seasonally on the Toledo Division and they were the plaintiffs in this action.

The consolidation took place and over a year elapsed during which these trainmen were not paid the compensation promised. Arbitration pursuant to the collective agreement was agreed upon. At that point in 1965 the union and petitioner entered into a new agreement which reduced substantially the benefits of the junior trainmen who had been Sandusky Line employees. The District Court (287 F. Supp. 221, 309 F. Supp. 575) held that this new agreement was not enforceable as a matter of law as it violated the Act under which the consolidation or merger took place. The Court of Appeals affirmed, 436 F. 2d 841, with a modification that the damages due

respondent-employees should be determined by the District Court, not through arbitration. The case is here on a petition for a writ of certiorari which we granted, 402 U. S. 994.

Section 5 (2)(f) [1] of the Interstate Commerce Act as amended, 54 Stat. 906, 49 U. S. C. § 5 (2)(f), provides that in mergers and consolidations "the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected" for a period of four years.

The ICC in its approval of the consolidation or merger (324 I. C. C. 1, 106 (1964)) stated that the agreements respecting, *inter alia*, the rights of the Sandusky Line employees were "made pursuant to and in conformity with section 5 (2)(f) of the Interstate Commerce Act for the protection of covered employees." [2]

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[1] It provides:

"As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

[2] The Commission stated in its Report, 324 I. C. C., at 50:

"As previously stated herein and in appendix A, various agreements have been reached between employee representatives and

It construed the agreements as requiring "that job eliminations as a result of the proposed acquisition of control be accomplished only through normal attrition." *Ibid.*

The mandate of § 5 (2)(f) seems clear enough: the Commission "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." The Commission, as noted, said that the conditions protective of the employees were made pursuant to and in conformity with the provisions of § 5 (2)(f) and it gave its authorization "subject to such agree-

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the Norfolk & Western for the protection of employees adversely affected by these transactions. Our authorizations herein will, by reference, be made subject to such agreements. . . .

"We find that, as conditioned herein, the transactions under consideration meet the requirements prescribed by sections 5 (2) and 20a of the act and conform generally with the purposes and objectives of the national transportation policy declared by Congress. We are convinced that the transactions should be approved."

In the Appendix to its Report and Order, 324 I. C. C., at 89, the Commission continued:

"Norfolk & Western has entered into an agreement with 19 of the principal labor organizations, members of the Railway Labor Executives' Association, for the protection of employees of Norfolk & Western, Nickel Plate, and Wabash, as well as persons employed on the Sandusky Line of Pennsylvania, represented by these organizations. This agreement, which provides for the assumption by Norfolk & Western of all outstanding labor contracts, schedules and agreements of Nickel Plate and Wabash, as well as those having application on the Sandusky Line, basically requires that job eliminations as a result of the unification be accomplished only through normal attrition. Under its terms, Norfolk & Western agrees to take into its employment, upon consummation of the merger, lease, and purchase, all employees of the lines involved with the guarantee that they will not be adversely affected in their employment as a result of the proposed transactions or for any reason other than furloughs due to seasonal requirements or a decline in volume of traffic or revenue."

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ments." 324 I. C. C., at 50. The Solicitor General and the ICC argue in their *amicus curiae* brief that the last sentence of § 5 (2)(f)—the "notwithstanding" provision—relieved the Commission of any duty to review the adequacy of the protective provisions contained in a collective-bargaining agreement, and that they were not accorded protection by the ICC order.[3]

We disagree with that view. We reviewed the history of § 5 (2)(f) in *Railway Executives' Assn.* v. *United States,* 339 U. S. 142, and said that "one of its principal purposes was to provide mandatory protection for the interests of employees affected by railroad consolidations."[4] *Id.,* at 148. That "mandatory protection" can be accorded by terms provided by the Commission, or, as is more likely, by provisions of a collective agreement which the Commission adopts or approves as adequate for a minimum of four years (as required by the second sentence) or longer (as allowed by the first sentence) if the Commission so provides. *Id.,* at 154. The purpose of § 5 (2)(f) was not to freeze jobs but to provide compensatory conditions. *Brotherhood of Maintenance of Way Employes* v. *United States,* 366 U. S. 169, 175–176. In that case we noted that the Commission has consistently followed that practice "in over 80 cases, with the full support of the intervening brotherhoods." *Id.,* at 177. And the Commission over and over again has adopted the set of labor conditions contained in collective agreements in discharge of its duty under § 5 (2)(f). See *Gulf, M. & O. R. Co. Purchase,* 261 I. C. C. 405, 434; *Erie R. Co. Trackage Rights,* 295 I. C. C. 303, 305;

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[3] The result, of course, would be that there would be no basis for judicial review of the ICC order pursuant to 28 U. S. C. § 1336.

[4] A synopsis of the legislative history of § 5 (2)(f) is contained in an Appendix to our opinion in *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.,* 347 U. S. 298, 315.

Delaware, L. & W. R. Co. Trackage Rights, 295 I. C. C. 743, 755–756.

When there is a collective agreement and the Commission, as here, adopts or approves it, the "notwithstanding" sentence of § 5 (2)(f) is not, as suggested, read out of the Act. The collective agreement then becomes a "condition" of the Commission's "approval" of the consolidation under the first sentence of § 5 (2)(f) and its provisions are deemed by the Commission to be "a fair and equitable arrangement to protect the interests" of the employees within the meaning of the first sentence. Thus, the significance of the "notwithstanding" proviso is that it provides the machinery for the terms of a pre-merger collective agreement and thus supplies the minimum measure of fairness required under the first sentence of § 5 (2)(f).

In 1965 an implementing agreement, entered into after the consolidation, was made between the union and petitioner. It is petitioner's claim that it limited these junior employees to their average monthly earnings on the Sandusky Line during the 12 months before the consolidation, regardless of how many months the employee had worked during that period on other sections of the Toledo Division. That is to say, each of them would receive under the 1965 implementing agreement an average monthly compensation based only on their seasonal Sandusky Line work. Thus, respondent Nemitz had an average monthly compensation of $583.34 representing pre-consolidation work on several sections of the Toledo Division. Under the § 5 (2)(f) agreement governing the consolidation, his earnings would be supplemented to the extent that his post-consolidation monthly earnings fell short of $583.34. Under the 1965 agreement his average monthly compensation, based solely on his work on the Sandusky Line, would be $194.40. Even

this amount would not be paid if, as likely, he received that much in unemployment compensation. The 1965 agreement obviously placed these junior employees "in a worse position with respect to compensation," as those words are used in the pre-consolidation agreement. For they no longer could work on any part of the former Toledo Division except the Sandusky Line and their prior compensation, reflecting in part work on other parts of the Toledo Division, was no longer a measure of the "compensation" to which they were entitled under the pre-consolidation agreement. For those whose historical average monthly earnings were so slight that they were now on unemployment insurance, the result would be much more drastic than "normal attrition" which the Commission said was the only way under the protective conditions by which jobs would be eliminated. The Court of Appeals said:

> "An agreement made pursuant to the last sentence of Sec. 5 (2)(f) may vary the protections afforded by the I. C. C. order, but it may not substantially abrogate employees' rights grounded in an I. C. C. order." 436 F. 2d, at 848.

We agree with that view. We also agree that the 1965 implementing agreement [5] abrogated the standard

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[5] The agreement authorized by the Commission when the merger was approved was described as follows by the Commisson, Appendix to Report and Order of Interstate Commerce Commission, 324 I. C. C., at 89:

"The agreement also authorized Norfolk & Western to transfer the work of employees throughout the merged system and requires the labor organizations to enter into implementing agreements permitting employees either to follow their work or be assigned to other jobs within their craft or class within the same general locality as existing jobs, following a period of retraining, if necessary, at Norfolk & Western's expense."

of "compensation" covered by the pre-consolidation agreement [6] which had come under the protective order of the Commission.

The judgment below is therefore

Affirmed.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE join, dissenting.

I am sympathetic with the respondents and with the unfortunate predicament in which, largely by their own acts, they find themselves. I feel, however, that the Court's decision to the effect that federal district court jurisdiction exists here and that the judgment of the Court of Appeals is to be affirmed amounts only to a sympathetically imposed judicial cure that is not authorized by the Interstate Commerce Act, that is violative of Congress' intent, and that ignores unusually clear legislative history.

In January 1962 the Norfolk & Western and the respondents' own Brotherhood, and others, entered into an agreement for the protection of employees in the event of approval of the anticipated merger. This agreement, by the express terms of its paragraph VIII, was directed to "the last sentence of Section 5 (2)(f) of the Interstate Commerce Act." In October 1965 the railroad and the union, and others, entered into an Implementing Agreement. It then follows, it seems to me, that a number of factors demand a result opposite to that reached by the Court:

1. *The very language of the statute.* Section 5 (2)(f) was added to the Interstate Commerce Act by the

[6] The union that negotiated the Implementing Agreement disagreed with that position as did the union's National Board of Appeals. Both, however, proceeded on a mistaken view of the law.

Transportation Act of 1940, 54 Stat. 906. It is the Act's only provision relating to employee benefits. The thrust of the subsection's third and last sentence, beginning with the exclusionary word "notwithstanding," is crucial here.

The first sentence directs the Interstate Commerce Commission, as a condition of its approval of any railroad merger, to "require a fair and equitable arrangement to protect the interests of the railroad employees affected." The second sentence states that in its order of approval the Commission shall include provisions protective for a four-year period. The third sentence then reads:

> "Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

This plain and unambiguous "notwithstanding" language, obviously and necessarily directed to and affecting only the two preceding sentences, requires that an agreement entered into by the carrier and the collective-bargaining representative be controlling. The two preceding sentences have application, therefore, only when an agreement "pertaining to the protection of the interests of said employees" is *not* executed. In the case before us the carrier and the Brotherhood did execute an agreement of the kind specified, and the "notwithstanding" language should come into play. The Court today nullifies that sentence and reads it out of the Act.

2. *The legislative history.* This history is clearly antagonistic to respondents' position here. The Transportation Act of 1940 was no accident or floor-conceived legislation. Indeed, Senator Wheeler was led to "venture

the assertion that the bill was given more careful and more thoughtful consideration than any other bill which has ever come before the Senate in my time." 86 Cong. Rec. 11270. It emerged from the economically distressed days of the 1930's, from the Washington Job Protection Agreement of 1936 (see Hearings on H. R. 2531 before the House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess., vol. 1, p. 231), and from recommendations of President F. D. Roosevelt's Committee of Six (see Hearings, *supra*, at 259).

What is now § 5 (2)(f) was not contained in the original House version (H. R. 4862, 76th Cong., 1st Sess.), or in the original Senate version (S. 2009, 76th Cong., 1st Sess.), or, indeed, in the draft contained in the initial H. R. Conf. Rep. No. 2016 of April 26, 1940, 76th Cong., 3d Sess. It surfaced as § 7 of the revised draft submitted with the supplanting H. R. Conf. Rep. No. 2832 of August 7, 1940, 76th Cong., 3d Sess. The new language replaced the earlier Harrington Amendment to the House version. The reasons for the change effected by the conferees are set forth on pages 68–69 of H. R. Conf. Rep. No. 2832. Although the comments there do not focus on the "notwithstanding" sentence, its purpose and significance are apparent from the debates.

Representative Harrington had succeeded in amending the House bill to include a directive that the Commission approve no transaction resulting in unemployment or displacement of employees. 84 Cong. Rec. 9882, 9886, 10127. The conference committee, however, eliminated all employee-protection provisions. When the bill again reached the House floor, Mr. Wadsworth proposed the recommitment of the bill with instructions, among others, to include merger provisions and the "notwithstanding" sentence, drafted by the railroad unions themselves. 86 Cong. Rec. 5886. As to that sentence,

Congressman Harrington, an advocate of compulsory employee protection, had said:

> "But this provision also contains a clause that permits the industry, through the processes of collective bargaining, to work out its problems in a democratic manner." 86 Cong. Rec. 5871.

The motion to recommit passed. The conference committee in due course then reported § 5 (2)(f) in its present form. Congressman Wolverton, a conferee, spoke in support of the revised bill:

> "And, then there was also further uncertainty in the opinion of some representatives of railroad labor as to whether the language of the amendment might not preclude voluntary agreements, between management and men by collective bargaining, from being entered into.
>
> "I want, however, to make it clear that no one who expressed the opinions I have mentioned thought for a moment that any of these possibilities were ever intended by the sponsors of the amendment." 86 Cong. Rec. 10189.

And Congressman Lea referred to the "notwithstanding" sentence as "a provision confirming the right of employees to enter into agreements with railroads to take care of them in case of unemployment as a result of consolidations." 86 Cong. Rec. 10178.

For me, all this evinces a clear and positive intent on the part of the authors of this legislation to make appropriate provision for employee protection, but explicitly to withdraw Commission-dictated protection whenever the carrier and the union, before merger, voluntarily arrive at protective provisions satisfactory to them. This was the purpose of the "notwithstanding" clause. Furthermore, it is in accord with the "strong federal labor policy against governmental interference with the sub-

stantive terms of collective-bargaining agreements." *Chicago & North Western R. Co.* v. *United Transportation Union,* 402 U. S. 570, 579 n. 11 (1971). In my view, the Court's decision today, and the decisions of the District Court and the Court of Appeals, overlook or choose to ignore this purpose and this legislative history. Instead, a result is achieved that is the exact opposite of the congressional intent and policy.

Respondents urge that this Court in the past has recognized the Commission's responsibility to review the sufficiency of third-sentence voluntary agreements and to "adopt" them as part of its orders, citing *Railway Executives' Assn.* v. *United States,* 339 U. S. 142 (1950), and *Brotherhood of Maintenance of Way Employes* v. *United States,* 366 U. S. 169 (1961). These are the only two decisions the Court produces to support its theory of jurisdiction. Neither is apposite. The former case presented the question whether under sentence two the Commission had the power to prescribe protective provisions extending beyond the four-year period to which that sentence refers. The holding was in the affirmative. The Court now makes much of the language of "mandatory protection" in that decision. But no pre-merger voluntary agreement had been made there, and the effect of sentence three did not enter the case. Nor had a pre-merger agreement been reached in the latter *Maintenance of Way* case, where the issue was whether, when the Commission formulates its own protective provisions under sentence two, it must require the carrier to retain employees for the four-year period or simply to guarantee them equivalent compensation. The disagreement between the parties there arose at the Commission hearing on what protective arrangements should be imposed by the Commission in fulfillment of its sentence two duty.

The Commission seems consistently to have taken a position in line with the legislative history noted above,

and with the clear meaning of the "notwithstanding" sentence. See, *e. g., Great Northern Pacific & Burlington Lines-Merger-Great Northern R. Co.*, 331 I. C. C. 228, 278 (1967); *Pennsylvania R. Co.-Merger-New York Central R. Co.*, 327 I. C. C. 475, 544 (1966); *Norfolk & Western R. Co. and New York, Chicago & St. Louis R. Co.-Merger*, 324 I. C. C. 1, 9, 90 (1964); *Missouri Pacific R. Corp. in Nebraska Trustee Operation*, 247 I. C. C. 653, 657 (1941).

Neither respondents nor the Court points to a single instance in which a pre-merger voluntary protective agreement directed at § 5 (2) (f) was either reviewed and found wanting by the Commission, or was "included" in the Commission's order in any sense except that recognition of the existence of such an order is necessary for the Commission to relieve itself of the duty that would otherwise be imposed on it by sentence two.*

3. *The effect on collective bargaining.* The result reached by the Court appears to me to require the ICC and the courts always to intrude upon collective bargaining, by reviewing the sufficiency of its substantive product, and thereby to discourage and to downgrade the collective-bargaining process that has been so firmly established in this area and so steadfastly protected. See, for example, *International Association of Machinists* v. *Street*, 367 U. S. 740 (1961). As this case makes only too clear, the general standard of sentence two of § 5 (2) (f), namely, "a worse position with respect to their employment," permits of widely varying interpretations when applied to specific dilemmas such as that of the

*Respondents refer to *Florida East Coast R. Co. Reorganization*, 307 I. C. C. 5 (1958), aff'd, 312 I. C. C. 744, aff'd, 171 F. Supp. 512 (SD Fla. 1959), but the District Court's decision in that case plainly sustained the Commission's determination that because a bankruptcy reorganization was involved, no part of § 5 (2) (f) was applicable.

respondents here. The Court's holding implies for me that any agreement between the carrier and the Brotherhood pursuant to sentence three of § 5 (2)(f), however protective, is nevertheless not to be regarded as controlling if it is subsequently deemed less protective than Commissioners or judges think it should have been. Neither the language nor the legislative history warrants our espousing such judicial overview.

4. *The facts and the element of choice.* Contrary to the impression one might receive from a quick appraisal of either the opinions below or that of the Court here, it is not at all clear that the Implementing Agreement took from respondents something they had a reasonable expectation of receiving when the merger was approved. On its face, the application to respondents of the 1962 agreement, the language of which ("placed in a worse position with respect to compensation") reflected the generality of § 5 (2)(f), is ambiguous. Interpretation of this language necessarily requires an understanding of the parties' original intentions with respect to Sandusky Line employees. Respondents were not without a substantial measure of selection of their future work at the time of the transfer of the Sandusky Line. That choice was between continued employment with the Pennsylvania, with seniority on its Toledo division maintained, or abandoning a part of their working territory and casting their lot with Norfolk & Western as acquirer of the Sandusky Line. Had they chosen to stay with the Pennsylvania, as it appears the parties to the agreement expected they would, respondents would not have brought on their present plight. For personal reasons such as, perhaps, residence in Sandusky (a factor of less than ideal convenience in the off-season regardless of the choice they made), they chose the other course and incurred the risks both of new employment and of the application of the protective provisions to them

under the unexpected circumstances. This situation highlights the wisdom of the policy of § 5 (2)(f), namely, to leave the solution of their problem to their own Brotherhood (their bargaining representative with the Norfolk & Western as well as with the Pennsylvania), rather than to the benevolent hindsight of the Commission or of a court.

All this propels me to the conclusion that the Commission may not be held to have reviewed and incorporated the 1962 agreement into its 1964 order authorizing the merger. All it did was to state that its duty to see to the protection of employees under § 5 (2)(f) was satisfied by the execution of the 1962 agreement. It follows that there was no district court jurisdiction and that the respondents' complaint should have been dismissed.